COMMISSIONERS PROCEEDINGS
MAY 9, 2006
CLARK COUNTY, WASHINGTON

The Board convened in the Commissioners' Hearing Room, 6th Floor, Public Service Center, 1300 Franklin Street, Vancouver, Washington. Commissioners Stuart, Morris, and Boldt, Chair, present.

9:45 A.M.

PROCLAMATION

Commissioner Boldt read a proclamation declaring the week of May 7 through 13, 2006 as Building Safety Week in Clark County.

Jim Muir, Department of Community Development-Building Division, accepted the proclamation.

Commissioner Morris commented on the value of building inspectors.

10:00 A.M.

PLEDGE OF ALLEGIANCE

The Commissioners conducted the Flag Salute.

BID AWARD 2443

Reconvened a public hearing for Bid Award 2443 – Channel Bank Parts for CRESA. Mike Westerman, General Services, read a memo recommending that Bid 2443 be awarded to the lowest bidder.

Boldt asked for more information on the bid.

Westerman explained that channel bank parts are upgrade components to the radio equipment for the site towers and allows for greater communications throughout the county.

Barron added that it converts analog signals from a telephone line to digital signals carried over microwave.

There being no public comment, **MOVED** by Stuart to award Bid 2443 to Product Source International Datacom of Hackensack, New Jersey, in the total bid amount of $18,025.68, including Washington State sales tax, and grant authority to the County Administrator to sign all bid-related contracts. Commissioners Boldt, Stuart, and Morris voted aye. Motion carried. (See Tape 272)

BID AWARD 2444

Reconvened a public hearing for Bid Award 2444 – Rebid Annual Syringe Exchange. Mike Westerman, General Services, read a memo recommending that Bid 2444 be awarded to the lowest bidder.

Stuart said he didn't see a description of the program in the bid documentation and thought it would be good to have that.

John Wiesman, Director, Health Department, explained that the syringe exchange was a disease prevention program and its primary purpose is to control the epidemic of HIV and provide people with access to medical and drug treatment services. Mr. Wiesman said that in addition to syringe exchange, other services that are provided included HIV counseling and testing services; Hepatitis vaccinations; drug treatment referral; and medical services and referrals.

Boldt asked where the money came from.

Wiesman replied that it was a combination of funding from the state AIDS omnibus funding, and he believed some local funding as well.

There being no public comment, **MOVED** by Stuart to award Bid 2444 to North American Syringe Exchange Network of Tacoma, Washington, in the total bid amount of $83,644.46, including Washington State sales tax, and grant authority to the County Administrator to sign all bid-related contracts. Commissioners Boldt, Stuart, and Morris voted aye. Motion carried. (See Tape 272)

BID AWARD 2445

Reconvened a public hearing for Bid Award 2445 – Duty Weapon Holsters. Mike Westerman, General Services, read a memo recommending that Bid 2445 be awarded to the lowest bidder.

There being no public comment, **MOVED** by Stuart to award Bid 2445 to Law Enforcement Equipment Distribution of Tacoma, Washington, in the total bid amount of $15,930.60, including Washington State sales tax, and grant authority to the County Administrator to sign all bid-related contracts. Commissioners Boldt, Stuart, and Morris voted aye. Motion carried. (See Tape 272)

BID AWARD 2437

Reconvened a public hearing for Bid Award 2437 – Vista Meadows Neighborhood Park. Mike Westerman, General Services, read a memo recommending that Bid 2437, including alternate number one, be awarded to the lowest bidder.

There being no public comment, **MOVED** by Stuart to award Bid 2437 to Colf Construction of Vancouver, Washington, in the total bid amount of $327,373.80, including Washington State sales tax, and grant authority to the County Administrator to sign all bid-related contracts. Commissioners Boldt, Stuart, and Morris voted aye. Motion carried. (See Tape 272)

The Board of Commissioners adjourned and convened as the Board of Health

PUBLIC COMMENT

There was no public comment.

CONSENT AGENDA

Stuart referenced consent agenda item 2 and asked for more information about the candidate for the Public Health Officer.

Wiesman stated that Dr. Justin Denny was still with the Health Department and had agreed to remain there until the new Public Health Officer came on board. He said they were asking for approval of Dr. Alan Melnick as the new Public Health Officer, who has over 17 years of experience in the field; prior to that he worked for 9 years as a staff physician in Multnomah County Health Department. In addition, Dr. Melnick also holds a faculty appointment at Oregon Health and Sciences University in the area of preventative medicine and trains physicians for public health practice.

There being no public comment, **MOVED** by Stuart to approve items 1 and 2. Board members Boldt, Stuart, and Morris voted aye. Motion carried. (See Tape 272)

BOARD OF HEALTH COMMUNICATIONS

John Wiesman, Director, Health Department, commented about an upcoming television movie based on the bird flu called Fatal Contact-Bird Flu in America, and reminded people that this was fictional. He said he did hope it would motivate people in terms of preparedness. Wiesman said there are three things they would like people to do: 1) practice good hygiene, particularly hand washing; 2) ensure that they have several day's worth of emergency supplies at home, especially food and medication; and 3) have plans in place, such as preparing for child care, elderly parents, etc.

Wiesman also referred back to the Public Health Officer discussion and pointed out that they currently have informal relationships with back-up health officers and were looking at making those relationships more formalized through contracts within the next couple of months. He further explained the necessity for having the back-up health officers.

Adjourned and reconvened as the Board of Commissioners

PUBLIC COMMENT

There was no public comment.

CONSENT AGENDA

There being no public comment, **MOVED** by Stuart to approve items 1 through 12. Commissioners Boldt, Stuart, and Morris voted aye. Motion carried. (See Tape 272)

PUBLIC HEARING: 2006 ACTION PLAN, CDBG/HOME

Held a public hearing to receive and review public comment on the proposed use of 2006 CDBG and HOME funds.

Pete Munroe, CDBG/HOME Program Manager, Department of Community Services, presented. Mr. Munroe stated that the action plan had been advertised in the Columbian on April 10 and sent to area libraries, as well as posted on the county's website. He said they would be accepting comments until 5:00 p.m. on May 10, 2006. He said one proposed change was to correct a typo changing Priority Level Low to Priority Level Medium.

Boldt referred to page 31, Appendix to Certification, and asked if those were the proposals for the low to medium change.

Munroe said that what is going from low to medium is that they have a rating of various needs based on renters and whether they're small, large, elderly households and for households between 51% and 80% they originally had a priority level of low, but it should have been a medium level.

Boldt asked what the income range was.

Munroe said it is 51% to 80% of the area median income.

Morris asked what the median income is.

Munroe said that for a family of four it is approximately $57,500. He explained that the Action Plan was the 2006 use of CDBG and HOME funds. He outlined the proposed projects.

There was no public comment.

Stuart stated that he was honored to serve as the chair of the Urban Policy Board, which evaluates projects to receive CDBG funds. He said they receive a lot of project applications and although they cannot fund all of the projects, they are able a good portion of very important projects that benefit low income populations in the county. He expressed appreciation for Mr. Munroe's work.

There was no public comment. No formal action required.

PUBLIC HEARING: COLUMBIA RESOURCE COMPANY – SOLID WASTE

Held a public hearing to consider extending and amending the contract regarding Solid Waste, Recycling, Transfer, Transport, and Out-of-County Disposal between Clark County, Washington and Columbia Resource Company, L.P.

Anita Largent, Solid Waste Manager, Department of Public Works, presented. Ms. Largent stated that this amendment would allow for the final development of the proposed previously planned third transfer facility, and would also allow for capital improvements to the two existing facilities. She further explained.

There being no public comment, **MOVED** by Stuart to approve Resolution 2005-05-11 for the extension and amendment to the contract with Columbia Resource Company. Commissioners Boldt, Stuart, and Morris voted aye. Motion carried. (See Tape 272)

PUBLIC HEARING: URBAN HOLDING

Held a public hearing to consider rezoning properties in portions of the northern Vancouver Urban Growth Area with Urban Holding overlay to the underlying zoning district. The Board may also review draft development agreements to assure that the requirements of the Comprehensive Plan and UDC provisions are fulfilled. Hearing continued from April 25, 2006.

****Verbatim****

BOLDT: Next we will move on to Urban Holding. We have a resolution, I believe, somewhat in front of us. I'm not to sure if we're going to do anything today since it was kind of out.

MARTY SNELL: Good morning, Commissioners. Marty Snell with Long Range Planning. This is a continued item from a couple of weeks ago and essentially Rich Lowry and I made a couple of edits to the last draft ordinance and you'll see that we provided a clean copy of that to you, as well as a copy that shows the revisions. We've also received a couple of pieces of correspondence late, one from James Howsley, who's looked at proposing some edits. We also have a letter from Marnie Allen from the Battle Ground School District and one from the City of Vancouver. We'll answer any questions you might have regarding this item.

BOLDT: You, I guess maybe just summarize the high points. Hopefully they're high.

RICH LOWRY: The board continued your last hearing in part because the proposed ordinance had only been made public the day of your hearing and there was a desire to give folk opportunity to comment on the ordinance. We received two comments, one as a result of a meeting we had with the Builders Association, and the second must have been received very recently because I only saw it this morning from Mr. Howsley.

The homebuilders raised four issues with us in the meeting, the first being process. They criticized the events leading up to the board hearing because they were not directly involved at the table. My only response to that is that we're dealing with a specific group of developers that have approached the county with a proposal to remove urban holding for their properties. That's not unusual that we'd have that kind of contact and we normally—at least the staff level—don't have a big public process at that time involving either the homebuilders or neighborhood associations or environmental groups, but rather attempt to work with the proponents to come up with a proposal, which is then made public and available for everybody to review. But process was an issue with the homebuilders. Then three substantive issues regarding the development agreement, two of which we have attempted to address in the modifications that you have before you. The one that we haven't addressed is a concern that the proposed ordinance may set a precedent in terms of providing school districts essentially a veto

authority over the ability to remove property from urban holding, and that's a legitimate concern. However, the way the ordinance is written the section dealing with the school districts, which is Section 4, doesn't contain any county policy or direction. It simply indicates that this is what the school districts have indicated…or what Battle Ground School District has indicated would be acceptable to them in terms of the ability to keep up with development. And then Section 5 indicates that this initial wave of developers are conceptually agreeable to what the district has in mind. The county was not involved at all with the negotiations that occurred between these developers and the school district so the resolution doesn't really establish any kind of county determination other than to indicate the district says that these things happen, they can keep up with development. The developers are indicating that that's conceptually acceptable, and the ordinance itself simply incorporates those understandings, doesn't ask the board to really create any precedential policy at all. The two issues from the homebuilders that we have attempted to address deal with identification of who these initial wave of developers are and what properties they have an interest in, and we're proposing to attach a second exhibit to the resolution that would contain the identification—both of the developers and the properties affected. The last issue dealt with what happens to latecomers and we proposed adding language to Section 6.2.a, which would provide that latecomers, if that's a proper term, who come in subsequent to this development agreement but before new impact fees are adopted for roads and schools, would have their urban holding lifted upon entry into a development agreement where they agree to pay the enhanced TIF's that are adopted. They would not be obligated to deal with the local improvements that are the second part of the development agreement that would apply to the initial group of developers; and second, that following adoption of a new TIF program and a new SIF rates, urban holding would be lifted for any remaining properties within the subareas.

The second comment…or the second response we've had very recently is from Mr. Howsley. His edits really are in the nature of clarifications and generally seen to be acceptable. There's one proposed amendment to Section 4.5 that I think we need to talk a little bit about and make sure that we're on the same page. Specifically, the issue is that impact fees are due at the date

of building permit. This section is unclear in terms of whether that rule is proposed to be changed under this development agreement and it's simply a matter of some additional clarification. Because we don't have the new exhibit with the developer identification and property identifications and I think we need a bit of time to finalize the language in this one section. I'd recommend that the board go ahead and take action on the resolution, if you're prepared to do so this morning, but not in fact executed until we have the finalized revisions back to the board.

MORRIS: Would you revisit your explanation about the concerns from the homebuilders? It sounded to me—and I came in a little bit late—that there are sort of two groups here, one is the developers that have been working this through and the second is those who have been represented by the homebuilders and the homebuilders have raised issues recently and you have tried to address them, but I'm not sure I understand what you did.

LOWRY: Okay, real quickly then, again there were four issues that were raised in our meeting with the homebuilders. One, process and that was…they felt that the homebuilders should have been at the table when we negotiated this with the initial group of developers. I don't think staff agrees with that…I mean the public process after a concept is developed seems normal business and appropriate here. The only unfortunate thing is we didn't have the actual document for everybody to review until the last minute. The three substantive concerns—I think we've addressed two of them—relating to actual identification of what properties and what developers are involved in this initial development agreement; and the second being latecomers, that essentially the group that may be partially represented by the homebuilders and I think we've adequately addressed that issue by providing in the proposed amendments that anybody…any other owner within the subareas who wants to have urban holding lifted can do so simply by development agreement where they agree to pay the same enhanced impact fees as is contained in this proposal, and providing that once new impact fees are adopted the board intends to release urban holding for all of these subareas. The one issue that we have not attempted to

address deals with school districts and the concern on the part of the homebuilders that this ordinance may provide a precedent that suggests that school districts have a veto authority over lifting urban holding. We don't think this ordinance does that. It doesn't express any board intent to give school districts any kind of a veto authority. The provisions dealing with the school district were negotiated without the county at the table and its simply a method of providing a basis for the board to make a finding that the school district can handle the growth that would occur within these subareas.

MORRIS: Thank you.

BOLDT: Okay. Any other questions? You said if we…we could approve the resolution today, but not enact the resolution until we have the developer agreements?

LOWRY: No. We need to do some final edits to try and incorporate Mr. Howsley's comments and to get the additional exhibit and those are very technical in nature and I don't think involve anything that would require the board to have another public session to review. The developer agreement…the resolution won't go into effect—other than Subarea A—until the developer agreement has been finalized. That's going to take some period of time, both because we need to get the hard numbers, which we don't now have although engineers retained both by the county and the development interests are working on the issues. So I think, if I recall correctly, the estimated time is somewhere in the nature of a couple of months before that would be completed. The resolution does authorize these developers to go ahead and get into the process through pre-apps and I think we have something over a thousand lots that have been put into the system on pre-apps already.

BOLDT: Okay, and Marty, the resolution we got yesterday went out –

SNELL: And it's at the back table. There's a clean copy of it and then one that shows the revisions from yesterday.

BOLDT: So we could probably have an opportunity for comments made on this before we…

SNELL: Yes.

BOLDT: Okay, with that we will go to…some people didn't say if they wish to testify or not so I'll just go through them. Is it Jim Keithley? No? Don Scott? No. Steve Madsen?

STEVE MADSEN: My name is Steve Madsen, I'm the Governmental Affairs Director for the Building Industry Association of Clark County. [Tape switches to side B] if I'm starting to go over time, please give me a little heads up so I can have a minute to wrap up. Before I address Mr. Lowry's comments regarding the issues we had in our meeting last week, I wanted to say that I would like to have provided more written comments on this, but we only had a meeting with the Battle Ground School District yesterday so the tract of this thing has just really caught us off guard in the context of everything else that we're working on. This is a difficult position to be in because I'm sure my comments are going to cut both ways across our membership, but the…to summarize at the beginning, I believe this is a terrible ordinance. I believe it's terrible structurally and I believe it contains things that may not even be legal. First of all, I would like to suggest that any notes and minutes from these private meetings between the county, school district, and development interests be made public. I completely disagree with Mr. Lowry's characterization that this is the way business is normally done. This is a…I can't think of an issue that's a hotter button issue for the development community than urban holdings. It was in effect one of the primary centerpieces of the original lawsuit, an appeal of the original September comp plan. To say that this issue can be resolved without input…or this ordinance could be crafted without input from the development community as a whole I think is not correct and not the way to do business as usual.

With respect to specific provisions of the ordinance, I'll just go walk down through them. The one that is the most glaring in my mind problem with the ordinance is in its structure—I'm referring to Sections 3 and 4—and…

MORRIS: Which document are you working from?

MADSEN: Whatever the one is back on the table, I just picked up.

MORRIS: Is that the one that we had yesterday from staff?

BOLDT: Yeah it's the one…yes.

MADSEN: I don't think the sectioning has changed at all through the ordinance, but in any event –

MORRIS: Which sections again?

MADSEN: Sections 3 and 4. These are esoteric discussions in the body of a document that purports to make law. Presumably…and quite frankly I don't recall ever seeing an ordinance that had quite this level of non-specific discussion about justifying what's in the ordinance. As we all know, lawyers can be very creative about how they use language in ordinances to bend it to their purposes and so I would first suggest that both those sections be completely removed from this ordinance. They have no place in it. They do not…they do not do what—and let me back up for a second, I'm not clear if this is an ordinance or a resolution, and I'm not clear in the county's mind what the distinction is, if there is a distinction.

LOWRY: There really is not a distinction between a resolution and an ordinance for a non-charter county. They can be used interchangeably. The significance normally is where there is local referendum authority, which doesn't exist for counties. We try to use the word ordinance when we're dealing with something of general applicability, and resolution when we're dealing with something more specific, but there's not a legal significance.

MADSEN: And I would suggest characterizing this more properly as a resolution then an ordinance, even though the document says ordinance at the top.

BOLDT: Excuse me, Mr. Madsen, in referring to taking Section 3 and Section 4 out, are you saying then that looking at the plan language we don't have to address these two, or are you saying we're addressing them wrong?

MADSEN: No, I think…well, I'm not saying that you don't have to address them and, quite frankly, that there's been substantial discussion between myself—even Mr. Horenstein at our land use conference that was held last week at Ocean Shores suggested that…and I assume he was referring to the…I'll use the phrase school concurrency provisions within the comprehensive plan, that might have been more properly litigated as opposed to dismissed so that we would get better guidance from the Growth Management Hearings Board. So I agree that they have to be addressed under the context of the comp plan that we're stuck with, nevertheless I think the discussion in those two sections is superfluous to the ordinance itself.

BOLDT: Oh, okay.

MADSEN: Okay. That having been said, those are structural comments. As far as the substantive comments, we're not inclined—and when I say "we" I'm referring to our association, which it's clear at the table we don't speak for every developer out there; that would be ludicrous to assume that anyway. We have numbers with substantially varying interests

and different financial interests, as well as different philosophical interests. It is not acceptable to the association to make the requirement of individualized development agreements where we have not...and craft them into an ordinance where we have not even seen what the development agreements look like. Initially we have problem with this requirement whatsoever…I just recently re-read the [Drabeck] opinion that came out in January of this year that discussed how you can spend your impact fees, that you can spend them district-wide even though the specific project may not have a direct impact on that specific school project, but I would also suggest that that opinion lays out fairly clearly what revenue sources are available at this level to the school districts and I would suggest that mandatory development agreements are not one of those things that are authorized by the GMA, okay. Again, haven't had even nearly enough time to research that, but at least a facile reading of that case would suggest that to me so I would suggest that undertake some review, just what tools exactly does the county have and not have with respect to school funding.

We met with the Battle Ground school district and we do agree on a couple of things. The things that we agree on are that this ordinance is not what either of our organizations want. While we have been aggressive about urging the county…and I note that your ordinance even indicates that direction was given in March of '05, so it's been quite a long time. We agree that this is not the ordinance that we want. We agree for a couple of different reasons. In our mind, the school veto issue is huge. We are willing, under the new comprehensive—and I'll just cut to the chase—we are willing, as an association, to wait for TIF and SIF schedules. We are not inclined to agree to this kind of slap together, ad hoc, site-specific—which, again, I think is contrary to the intent of the comprehensive plan—lifting of urban holdings based on whoever can cut whatever deal with the school district. And that's how it looks to us. As an organization, it's our position we'd just as soon wait for the TIF and SIF schedules to come out. If we have problems with those, we can certainly take them up at that time. If we believe the school district's capital facilities plan is overly aggressive or does not realistically deal with the amount of growth they're likely to get, we'll take it up with them at that time. And quite frankly we want

to put the pressure on you guys to come up with a new comp plan and we are willing to work with the school districts. One of the suggestions that came up in our discussion was perhaps…well, one, that there be a consultation requirement within the new comp plan for the school district's fire and safety; two, that—I can't speak for my association on this because we haven't…my board hasn't addressed the issue, but in my mind one possibility would be a provision that does require, before urban holdings can be lifted, that school sites be physically sited and located, whether they're actually paid or not; that they be planned just like you would plan a mixed use development or anything else.

BOLDT: I need [inaudible]…

MADSEN: Okay. So we reject this ordinance. We reject its provisions and we reject the use of development agreements on an individualized basis. We'd rather do it the right way.

BOLDT: Okay. Thank you very much. Next we have Bridget Schwarz.

BRIDGET SCHWARZ: Good morning, my name is Bridget Schwarz and I'm here to provide some considerations for you today on behalf of Friends of Clark County. After our review of the impacts and the proposed process for lifting the urban holding designation, we find that Clark County has not met the phasing criteria for this action and so there is G through M. We see instead a recipe for sprawl. As this is a proposed template for lifting the urban holding area in areas B through F in the future, the negative consequences are even more widespread. Once a developer agreement is signed, it appears that a single development review application in each subarea of G through M will lift urban holding designation in that entire area. Since the cheapest land is typically at the fringe, it's reasonable to expect that those parcels will develop first. However, those areas at the fringe are usually the most expensive for urban service providers as well. We have a series of steps we propose you consider: 1) wait for the results of the Battle Ground School District bond election. If it fails, don't lift the urban holding designation until one

does; 2) wait for the new TIF scheduled for all areas of the county that are being prepared as part of the GMA update, then calculate the Orchards surcharge; 3) wait for the new capital facilities plan being prepared also for the GMA update, then negotiate the development agreement based on those costs, not the other way around; 4) don't except any development review applications in the urban holding area until the developer agreements are ready for signature. I think you'll get their attention and concentrated efforts; 5) as part of the developer agreement, establish a threshold for the percentage of each subarea that must meet development review approval and, thus, the funding for the needed transportation improvements before any building permits are issued; 6) allocate increased capacity to jobs-producing land uses first until the transportation infrastructure improvements are constructed; and 7) make sure the required transportation improvements needed for development approval do not divert resources from other projects already ranked on the TIPIT program.

Finally, I think you've heard the phrase 'perception is reality'. I don't want you to overlook the perception among the citizens of Clark County that developers exert an undue influence on our community's future at the expense of our quality of life. Give county residents an equal seat at the table as you develop this developer agreement and here's one reason why: at the April 25 public hearing you were told by staff about the two major transportation funding components for areas G through M. As is customary, the usual local improvements would be funded by the developer with guaranteed concurrency approval. The regional improvements would be funded by a TIF-type surcharge with no guaranteed concurrency approval. That distinction is vital. During the hearing, I sat behind one of the developer attorneys and he blurted out repeatedly, "It's the other way around." He was across the isle from another developer attorney and they agreed, "It's the other way around." The impact is enormous and I'm curious, and a little troubled, that when all three of them were up here testifying, not one of them called to your attention their disagreement with the materials that were handed out and discussed. Thank you.

BOLDT: Okay. Thank you very much. Jeffrey Bivens.

JEFFREY BIVENS: No.

BOLDT: Okay. I have Lynn Hicks, Shonny Bria, and Mary Vagner…come up…are you guys here? Just come up as a group, that'd be fine.

[Inaudible comments from audience members.]

BOLDT: That'd be perfect. Thank you. You can go ahead.

LYNN HICKS: Thank you. I'm Lynn Hicks from the Battle Ground School District.

SHONNY BRIA: I'm Shonny Bria, Superintendent of the Battle Ground School District.

MARNIE ALLEN: Marnie Allen, Attorney here representing the Battle Ground School District.

MARY VAGNER: Mary Vagner, Ridgefield School District.

HICKS: And we're here today to talk about urban holding and each of us has a piece that we'd like to say and I'd like Shonny to start first.

BRIA: Thank you very much for having us here and listening to us. I really appreciate it. As superintendent of the Battle Ground School District, I'm the eyes and the ears of the children that are attending the school district and the future children who will be attending our district. Last night, I had a nightmare—recently, we bought 60 acres that's about 5 or 6 miles east of downtown Battle Ground, north of Hockinson district—and last night I had a nightmare that the 60 acres were full of portables, relocateables, and busses were transporting children from the

southern section of Battle Ground School District. That's a very very scary thought. It's a very scary thought for us as educators, of course for you, and, in addition, for the homeowners and parents of children that will be moving into our district.

HICKS: I wanted just to remind you all of the area that we're talking about—the urban holding area—and about the statistics of the schools that are there right now. The area that most of this G though M is located in is in our Glenwood-Lauren Prairie area and currently the Glenwood-Lauren campus—Glenwood's at K-4 and Lauren's at 5-8—there are 1,300 students already enrolled there; 720 at the primary; and 583 in the middle school. All of the classrooms are full with homeroom classes, elective programs or special education programs. There are 19 portable classrooms already located at the site. We added 4 classrooms in 2002; 4 in 2004; and 6 in 2005. So it's an area in the county that already has seen quite a bit of growth. Through the information that we got from county staff, if the urban holding is lifted, 1,481 students could attend those schools. We know they wouldn't all come at once, but with 1,000 homes already there and looking at being built we know they would come soon. Potential for adding portables at this site—Glenwood and Lauren is on a septic system so really we could only add 4 more classrooms to that site. When we looked at G, H, I, K, and L, those are the areas that would impact Glenwood-Lauren…if we have 25 kids to a class, which is about our average, we would need to add 59 classrooms for all those students and right now we have the capacity to add 4 classrooms, so that would be 100 kids out of the 1,400 that we could house there.

So that's the situation that exists in our school district right now. We don't have land in that area and the current bond that was passed in March 2005…the 2 K schools that we're going to be building now are in the Battle Ground area. One of them is what we call the Cresap property, west of Battle Ground a little bit, and the other one will be built on the property that Shonny was just talking about, to the east. Urban holding is obviously a controversial topic for everybody and our school district is caught in the middle. You heard testimony from the Building Industry Association…they don't like the language that's in the ordinance. We've got to do something to

help and we are a district that is…our superintendent and our board are collaborative and what we're looking for is partners to help us with this. We're looking for a partnership with you all. We're looking for a partnership with the developers and the builders in this area. And I can give you an example of a partnership that we've had and the gentleman who put this together is here today, Mr. Ed Greer. When we purchased the Cresap property, Ed already had an option to purchase the 40 acres that was owned by Vernon Cresap, but we went to him and said, you know, we're pretty desperate for school sites and Ed thought about it and I know he still made money on the deal—I don't know how much—but he thought about it and he said, you what, you're right, you do need a school in this area and let me see if I can help you. And he let us have an option on 20 acres and in addition to that he's been a partner with us as we've developed that school. He's worked with us on sewer connections; he's worked with us on getting his housing development situated really well with the school so that whole area is going to be a very very nice facility for the community. That's the kind of partners and that's the kind of help that we need in looking at lifting of this urban holding.

MARNIE ALLEN: Again, for the record my name is Marnie Allen. I'm an attorney representing the Battle Ground School District. My mailing address is 1014 Franklin Street in Vancouver. I want to just touch briefly on the ordinance that's before you and a little bit about the process in how we got to where we are, I guess, and just start off by saying I hadn't had an opportunity to see the revised language that's before you today until this morning and I just had only a few minutes to look at proposed revisions that Mr. Howsley has presented. But before we talk about the language in the ordinance, I want to clarify that there's not a specific development agreement, there's no proposed development agreement that the district has yet drafted or that's been negotiated. As Ms. Hicks testified, some representatives of property owners approached the district and said they were interested in talking with the district about the school district's needs and the district is interested in, and appreciates, a collaborative approach. We also very much appreciate the work that county staff has done and we really appreciate the commissioners' interest in schools and making sure we work together to provide

school facilities. Our goal is to get facilities online to serve students from the new housing as timely as we can, recognizing that there are some constraints outside all of our control. There was one meeting that I attended with school district staff with representatives of property owners and at the end of that meeting a letter was drafted that you've seen that made its way into the proposed ordinance that just outlines some general concepts that were discussed. They're concepts that are worth pursuing and that the district would be happy to talk with anyone who's interested in about memorializing an agreement, but as you might expect it makes the district a little bit nervous about an ordinance that makes findings that there's adequacy of school facilities when we don't have a negotiated development agreement yet. We don't have the terms flushed out. It also is two primary issues or concerns for the district: one is the pending election on the maintenance and operation levy and the district's needs will change and are dependent on what happens at that election on May 16. The other is a school site. There's going to need to be property in the southern portion of the district that the district currently does not own to build at least one K school, maybe 2, and maybe a high school to serve development in that area and at this point we don't even have a school site. So those are real concerns and issues for the district. What the district, because of those concerns, would ask you to consider is not adopting the ordinance and making a decision today; to continue this out for 30 days; give us a month to see what happens with the election, and a month to work with interested parties on development agreements, something that also can be taken to the school district board of directors for approval so we have more details in a more comfortable position to assess school facility and how we'll serve the new development. If the will of the commission is not to postpone this and you for other reasons feel a need to adopt an ordinance today or in a week, I want to just ask a couple of questions and make one comment on the language that was being proposed by Mr. Howsley—I'm looking at a clean copy of ordinance 2006…the clean copy of the ordinance that was on the back table that you should have before you, and in Section 4 are the 5 general concepts that were in the letter that he sent. Concept 2, I wanted to just clarify and propose some language that would clarify what I understand the intent to be, and this has to do with mitigation payments or the equivalent of school impact fees. Right now that

language says that the development agreement would include…would address payment of fees and it talks about the existing fees and the difference between what the district's currently collecting and some future amount. It's our understanding that that future amount, or the difference, would be the amount that is adopted in the district's 2006 capital facility plan and the impact fees that he Board of County Commissioners adopts, not the difference between what the district's currently collecting, which is discounted from what the formula under the county ordinance would allow. So I would like the commission to consider adding the following language at the end of that paragraph, so after it says, "…the difference between the existing fee and the full amount that the district could be collecting…" insert: "when the district's 2006 CFP and impact fees are adopted." That clarifies we're talking about the new fee amount that they'll be bringing to the county and the city in the fall. And then if you turn the page –

MORRIS: Could you finish that – "…when the district's CFP…" and what?

ALLEN: Impact fees. School impact fees are adopted.

MORRIS: Thank you.

ALLEN: If you turn the page in this ordinance, go to the last page, Section 6, the new language in paragraph 2 talks about the development agreements only being required until new TIF and school impact fees are adopted, and while school impact fees or payment of the mitigation fee is contemplated for development agreement with the district, what this paragraph overlooks is school site and the requirement and the need that the district has to work with developers on securing the school site. So my question is, if this ordinance is adopted the way it's currently proposed, we don't through our negotiations and development agreements have a school site and the updated capital facility plan and school impact fees come back before the board and are adopted in the fall we will lose our ability to work with developers to secure a school site. And we're not talking about requiring developers to dedicate or give the district property for

free, but we do need some help finding and integrating a school site. So had a question about how that language was intended to apply and I guess I also had maybe one suggestion and that was in that paragraph 2(a) on the 1, 2, 3, 4, 5, 6, 7…7th line down it starts with the word "commitment"…if you were to delete "upon execution by the owners thereof of development agreements." And delete "containing a commitment to pay such enhanced impact fees…" and we're trying to clarify it's not just the payment of fees that we're trying to work with developers on.

One last comment on the ordinance and that's the language that Mr. Howlsey proposed with some new language to paragraph 5 at the very top of that same page. It was intended to clarify the nature of the security interest that might be required in a development agreement, and he has proposed some language that would say the district wouldn't require that security interest until the developer had secured all of the approvals, including the right to get building permits. If you include that language, it undermines the purpose of requiring the security interest. The reason the district's requiring it is because impact fees are paid when the building permits are pulled over a period of time and rather than waiting…and collecting that money as building permits are pulled, if we could get some security interest just for the amount that will be paid, we'd be in a position to perhaps go out and borrow money or use it as leverage to get state match. I would just request that you not include the new language that Mr. Howsley has proposed in that section and leave that as something that can be negotiated and addressed specifically in the development agreement itself, if there are concerns about timing.

BOLDT: Okay.

MORRIS: Before we leave Battle Ground, Mr. Howsley has suggested on page 3 of the ordinance, line 40, that the word "could"…or line 40, page 3, should be stricken and the word "would" be inserted so that the line would read, "optional mitigation measures would address

the impacts of residential development in subareas G through M." Do you have any comments on that change?

ALLEN: Yeah, we think it should say "could".

MORRIS: Thank you.

BOLDT: Okay.

MARY VAGNER: Mary Vagner, Ridgefield School District. Thank you for the opportunity today to speak to you on behalf of the decisions that you may be making with regard to urban holding and releasing that holding. Areas A, and G through M, which are under the discussion today are outside of the Ridgefield School District, with the exception of the northern slice of area A. We believe we will be able to accommodate the small number of children that would be coming into our district out of that northern slice of area A. However, areas B through F, which are not to be discussed today with regard to release, do offer for the district a tax base diversity because they are not solely residential areas and our district currently is a district that is reliant on the homeowner as our property tax payer. And as we have said before, we would be in favor of release of some urban holding in those areas as they do create a better tax base for us. We do continue to value urban holding as a tool for growth management and we thank you for your consideration of the challenges of schools to address increased capacity of students.

STUART: I have a couple of questions for school representatives and I think it's primarily for Battle Ground School District. The first question I have, and I've heard it now twice, that depending on what happens with the operating levy in May, that could change how you look at this. Now the operating levy is for operating funds, which generally speaking, have never been something the development community has paid; we're talking about the capital side, which the development community can be more reasonably tied to and it's more…there's more of a nexus

between that. So are you saying that you would be requiring more on the operating side out of urban holding properties if the levy fails?

HICKS: No, those two aren't tied together that way. It would be…if the levy doesn't pass, it'll be pretty catastrophic for our school district operationally and as I mentioned the last time I was here, we would have to lay off between 40 and 50 teachers and that will happen May 15 because that's the deadline, and 12 assistant principles, and that doesn't take into account the materials and supplies that we'll have to cut. So our board will have a difficult time putting together that no levy budget just for the places…the homes and the kids that are there now. They are not tied that way.

BRIA: It is approximately seven million dollars.

STUART: For the operating levy?

BRIA: That's correct.

STUART: Okay, great.

ALLEN: Maybe I might just add, it would change the nature of the discussions and the focus, not requiring more in terms of payment or property, but we may need to have a broader strategy with the community about how it is we are going to get approval for maintenance and operations and a bond because even with the development agreement to build the school once we find the property we're going to have to a bond approved and timing all of those things is going to be important. So I'm just saying there'd have to be another big picture look about priorities and who's helped to elicit and make it all happen.

BRIA: I was just going to add that it would be truly appreciated if we could hold off for a month until we have the election behind us and it would give us some time to work with the Builders Association and other stakeholders so we could put a solid plan together. It would help both ways, if the levy fails or if the levy passes.

STUART: One more question for you and that is have you ever, any of the three of you, in the time that you've worked with the Battle Ground School District had a situation where you had business owners coming to you and partnering with you to offer locating suitable sites…school sites, mitigation…enhanced mitigation, support of bonds—all of the things that were mentioned in there—have you ever had that happen with business owners coming to you like that before?

HICKS: I think we've had some of that happen on occasion. Are you looking at the 5 pieces that are in the…yeah, we have had business certainly come and offer to help with levies and bonds –

STUART: Have you ever had the rest of it?

HICKS: People coming and offering dollars? Not until the county commissioners said you guys need to meet and talk, so…

STUART: So this is the first time that that's actually occurred?

HICKS: Uh-huh. The example that I gave you with Mr. Greer…we did go to him and ask him and he was willing to help us. There is one other thing that I want to say, and I think Marnie has one other thing also, but I do appreciate the help that you have given and I think our whole district appreciates the help that you've given to us through this time…we're not done with it yet, but we appreciate it and we appreciate the attorneys that came to us and said let's see if we can hammer out a way to make this work. We did have a conversation with the Building

Industry Association yesterday and brainstormed some ideas about maybe some different takes on the language that's in here. So as Shonny said, it's…we're not done with it yet. In listening to Ms. Schwarz when she came up here, she had some concepts also that I listened to and thought, hey, those are some good ideas. So I think we're not done and that's what we're asking for is a little bit more time to put this together. We're in the middle here and we want to work with everybody.

STUART: Thank you.

BOLDT: Anything else?

ALLEN: Lynn wanted me just to maybe make one brief comment on maybe there is a compromise position because there appear to be different interests between some members of the Building Industry Association and other property owners who have approached the district and want to go forward with a development agreement and those to things don't have to exist separate of each other. I think there is a way that…we would like more time, but we could within 30 days work on a development agreement, look at a plan that lifts urban holding and allows development to go forward for those property owners who want to go that route. For the Building Industry Association that wants to propose tying something into the comprehensive plan review and addressing schools in that context, the district's can work with them and as the county reviews the comprehensive plan review update, address those needs simultaneously as both processes are occurring.

BOLDT: Okay, thank you. Randy Printz? I think maybe I'll bring up Randy…Mr. Printz and Mr. Howsley and Mr. Horenstein. Thank you.

RANDY PRINTZ: Good afternoon…or morning I guess.

BOLDT: First of all, gentleman, I keep doing this to you every time, I'm very sorry, but we have two land use appeals after this.

PRINTZ: I don't have a great deal. Randy Printz, 805 Broadway. I'm here on behalf of some developers. Just a couple of comments initially. One, I do want to address some of the process comments that Mr. Madsen made. As you guys well know, we started this process in 2004 with the adoption of the [UH] in which the homebuilders were intermittently involved and actually represented by council. We've been through that appellant process. We've had hearings on this with this board. We've had a number of public work shops. We went to the county and said we need to do something—this group here representing a number of developers and builders—and said I don't know if we're just supposed to sit around and wait for somebody to resolve this for us. My phone has never rung from the homebuilders asking whether or not there's any help that they can lend or whether or not they wanted to be involved in the process. And it is hard for me to believe that in a process that is as important as it is to all of the development community and as intimately involved in all of these issues and with the expertise in all of these issues that the homebuilders have, that they could take the position that they've been surprised by the fact that something has been happening on urban holding.

The ordinance that's before you does not remove urban holding. It doesn't adopt any development agreements and it doesn't provide for any specific terms or language in those development agreements. What it does do is it provides a platform for the resolution of some of the urban holding issues. It provides a platform for additional private sector money to be put into transportation analysis. It provides a platform to work with the school districts to find them a site. This agreement…or this resolution or ordinance does not in any way preclude any other potential resolutions for urban holding. It doesn't say this is the only way you can do it, but it does say that if…that the board at least is recognizing that this is one process that can be utilized to make the essential findings that you're required to do under your own ordinance and under the state GMA to make findings where you can say there is adequate transportation facilities in

place, there's adequate sewer, there's adequate water, and that there is adequate capacity for schools. So that is all this agreement does and so in at least my view there is nothing happening here precludes any other sort of resolution. Delay of this, either in conjunction with the 2006 comp plan update or any other delay, does not facilitate the resolution of these issues. All it does is drag this out farther and farther and, again, we're out here 18 months—almost 2 years—since the adoption of urban holding and if the efforts that have been undertaken by the group that's sitting here haven't been done, we'd be two years behind and two year's more from resolution. So I would encourage you to adopt the ordinance. Thanks.

BOLDT: Thanks.

JAMES HOWSLEY: Chairman Boldt, Commissioner Morris, Commissioner Stuart, for the record, James Howsley, Miller Nash. I came here today only to talk about the proposed changes to the ordinance that I proposed to it yesterday and I would like to return to the language in moment, but if you would indulge me I do feel compelled to respond to some of the comments raised today on all sides. Commissioner Morris has told the development community for years now that due to the changing financial picture of local governments in the state of Washington due to voter-approved measures limiting revenue, that the development community is going to have to step up to the plate and be an active partner with local governments in order to solve common objectives. As an advocate for clients in the industry, I can say that we are attempting to that. My family has been an active part of this community for a long time. I've seen the ebbs and flows over time of the perceptions of development in this community, but what I have not seen until recently is a willingness of the development community to partner with local governments and partner with school districts to solve, or at least alleviate, some of the pressures that a growing community brings. The media in an attempt of the past perceptions of the development community has attempted to portray growth as a negative force in our community. We should thank our lucky stars that Clark County continues its robust growth. We should embrace growth not as a negative force, but as an evolution of our community. I love this

community. I grew up here and I'm very proud that we are growing. Without growth, our community might be withering on the vine like so many communities throughout the Midwest or in our own state. As Commissioner Morris eluded to in her 2005 State of the County Address, growth has brought us many things and the future looks bright for Clark County if we continue to embrace growth.

How does this relate to urban holding? When the development community agreed to withdraw its appeals in 2004 on the growth plan on the urban holding issues, it was with the understanding that there was a better way to facilitate a discussion of how to solve infrastructure issues facing our community rather than having the growth board or the courts dictate solutions to us. We have been working with the county and the school districts for almost a year now to figure out that path forward. While I agree with my colleague, Mr. Horenstein, who said this at the last hearing that the devil was still in the details through the development agreements, this ordinance at least allows us to continue forward and move forward with good faith discussions on how to solve these issues. I recognize the concerns that the building industry raised in relation to this ordinance and I would like to make it clear that this proposed ordinance and path forward should only be limited to those urban holding areas that we're discussing today. There might be "other tools in the toolbox," to quote Commissioner Stuart, that might be applicable to other areas. But for this area of urban holding, the hard work that your staff, the school district, and others have done, the development agreement seems to be the best way to move our common objectives forward. On the transportation end of things, we do agree with the industry in some sense that there might be other solutions that work for both large developers and small developers. One of our beliefs is that we believe a proportionate share system similar to that of the City of Vancouver might be a tool to resolve the inequity and continue forward in trying to resolve our common objectives. As to concerns raised by the building industry related to school districts, the school districts do have a provision in the state subdivision statute that allows them to stop development. We would just like to again draw that to your attention, if this has become such a concern. And as for Sections 3 and 4, these are findings, as Mr. Printz alluded to, that

are necessary under your own comprehensive plan and under your own ordinance required to have us move forward. Now as for the proposed language that I have proposed, there are two sections for which we did request amendments. These are amendments clarifying our understanding of what the discussions have been so far. That would be Section 4, subparagraph 5, in which we…we ask that while a security interest might be an acceptable tool for our clients, we must have reasonable assurances that we are able to attain necessary permits and enable them to move forward with a project. I do recognize the school district's concern that they're wanting the security interest up front so they can go out and bond, but at the same time we cannot provide that security interest without some assurances that the impact fees will not change, first of all, and secondly that we do have a project to move forward with. If we don't have a project to move forward with, why would be put up an irrevocable security interest. As for Section 5, we have proposed some language, I think as Mr. Lowry indicated earlier, that just gives a little bit more accurate picture of how I viewed the state of the discussions. We do not have final terms of an agreement yet and I would ask that…we have made good progress towards it, but I don't want to obligate our clients until we have final terms

Again, personally, I would like to thank your staff publicly. I would like to thank the school district publicly. And thank you for changing the discussion of development in this community and enabling a new era to take hold where the private side and local government can work together in partnership to solve these solutions creatively. Thank you.

BOLDT: Okay.

STEVE HORENSTEIN: Just very briefly because, again, both Mr. Howsley and Mr. Printz said everything I asked them to say. [Laughs] Couple of things: Commissioner Stuart, thank you for your comments regarding the distinction between bonds that provide for capital facilities and operational issues. I'm a little less, to be quite frank, I'm not quite as supportive of Mr. Howsley's comments about the school district as I'd like to be. I think you gave them an

opening…you gave them an inch and they are taking a mile. I don't know whether it's lack of understanding of what's going on here, but they're going well beyond today what development can do to help them. What they really need to do is understand that as development goes forward, they'll start collecting more property taxes and that seems to be lost to the discussion here, and some of the things they said here today would put us into a never neverland that we would never get resolved because you can't…we can't solve their operating problems. I am very supportive of their levy and always support school district levies, but that's not what this is about here today; it's about capital money—you had that just right and they are confused. I want to correct Mr. Madsen's mischaracterization of what I said editorially in the context of a continuing legal education course on land use planning that Mr. Lowry and I spoke at over the weekend where my job was to talk about urban holding. What I said was, and I believe this, is that I don't think faced with this situation again and a promise of the county to work with the community to resolve issues that I would ever dismiss an appeal. The reason I wouldn't do it is so we wouldn't be here today like we are. You needed the pressure of that appeal, we needed the pressure of that appeal, to keep going and I think we'd all be better off had we not dismissed it. That will never happen again, I think, from any of the three of us in this situation. This characterization of the development community as bad is—my word—is ridiculous. What we're here to do is facilitate your accommodation of population and jobs going forward. Neighborhood communities don't do that. School districts have a small role in it, but if it wasn't for the clients that we represent, there wouldn't be any accommodation of housing needs and commercial needs in this area or any other area. We've worked very hard to get this to where it needs to be. Mr. Howsley has proposed some minor, reasonable amendments. We need to move forward on this. We won't know what else to do without that. I mean, to go back to ground zero will take us a very long time. Let's move forward on what we can do. I still believe the devil is in the details. I think that the homebuilders are right in the sense that the transportation financing mechanism being talked about may not be that favorable, but we just started to talk about those and there's no reason why we can't have a plan for transportation

funding that works for the large and small developer at the same time. Let's get it done. Thank you.

BOLDT: Thank you. Any questions?

MORRIS: No, I just want to agree with Mr. Horenstein, and in retrospect it was not wise to dismiss the appeals. We would have been better off—all of us I believe—had we just allowed them to play out.

HORENSTEIN: Yes, thank you.

BOLDT: I have a question on that, Mr. Horenstein, I realize we don't know here what would have ever happened if you did not address them appeals, or withdraw them. If that would have gone on and if you had won, where would we be right now?

PRINTZ: We'd be back here.

HORENSTEIN: We'd still be here, but what the board…what we honestly believe the board would have told you is that urban holding is a legitimate, special implementation procedure, not necessarily mandated by the Growth Management Act—it's not—but they've already approved in the original appeals in the [inaudible] case in '95 and '96 that it's a legitimate tool. I think what they would have told you is the language in this one is too broad and it doesn't provide a sure opportunity for ever getting out of urban holding and it gave a veto power to other districts. So they would have sent it back to you, saying that it doesn't comply with GMA so fix it. That's what we would have gotten.

PRINTZ: The biggest problem with the ordinance is that there's absolutely no requirement in it to ever add…meet your basic GMA mandated [inaudible].

HORENSTEIN: What we're asking you to do is take a step to adding the first dirt that's been added to the urban growth boundary since 1994.

BOLDT: Okay. Thank you very much. We need some direction.

MORRIS: Well, I have some general comments. There have been bits and pieces that I have agreed with everything we've heard today. Mr. Horenstein, I should probably clarify that I didn't intend to give the school districts an inch, I intended to give them a mile. So they have not overstepped, as far as I'm concerned. The issues for schools differ significantly from those for transportation because transportation is treated as what we call hard concurrency in our code. In other words, if the traffic moves too slowly we don't allow any more houses. We do not have what is called hard concurrency for schools so it doesn't matter how crowded a classroom gets. I agree that the operating levy that faces voters in the Battle Ground School District is not a capital issue, but I would anticipate that the Battle Ground School District is not anxious to turn out to be another jail like the board visited several weeks ago in Oregon where there is a building, but there's no one to operate it and so it sits vacant.

I have some suggestions for how we might proceed. I agree with Mr. Madsen that the language here is extremely confusing and so I would suggest tightening amendments that under school district—and it's similar for school districts and for developer agreements that we dispense with any of the gentler language and we say instead, for instance on line 39 of my copy of my copy of the amendment, on page 3, that we drop out most of line 39 and we begin on line 40 with a capital M for mitigation and it would read, "Mitigation measures such as the following shall be used to address the impacts of residential developments in subareas G through M," and then we would use numbers 1 through 5 as written, but we would add a 6, which should surprise no one since I've said it for about a year and a half now, "provide public sewer to Glenwood and Lauren schools." I mean I don't know how we get more compelling testimony then they can

only have 4 more portables at those two schools because that's all the septic will take and yet to accommodate the 1,100 houses that are apparently already waiting in the wings here, you have to have 57 portables. You can't do it on that septic tank. It's not even a question of classroom space. It's a question of flushing space.

I would also suggest that under Development Agreements, that on line 18 the sentence begin with, "Developers shall participate in development agreements," and all of that gets rid of anything that is unusual that I've seen in ordinance language because I can't imagine that we really want to adopt code and have it written into our code that it says, "Battle Ground School District has indicated to developers…" – that's not the kind of code language we ought to be having. Code sets out standards to be met. Actually the school district today has indicated to us that these measures are more than likely to be sufficient so I'm willing to take their word for it and take out that first sentence and simply say, "these mitigation measures shall be used to address the impacts of residential developments in subareas G through M."

And overall comment on schools, I think, Mr. Madsen, that the time has come to seriously for the Homebuilders Association to begin a very rigorous investigation of how we are going to fund schools in this county and in this state, and what we may wind up doing as time passes here is seeing realignments of boundary lines. We have a similar circumstance occurring along the I-5 corridor with development in urban growth boundaries between Ridgefield and La Center, where because of the existing school district boundaries the City of Ridgefield is very likely to enjoy a significantly greater tax base because of the I-5 corridor then La Center is, and it's simply a matter of historic boundaries that were historic at the time that those boundaries were drawn. Highway 99 dissected the school districts as well as I can tell. Well, now it is I-5. The corridor has been built since the school districts lines were drawn. The Battle Ground School District is phenomenally large geographically. It encounters any number of transport problems; simply getting busses around when other parts of this county have schools open as usual on heavy days, there are schools closed in Battle Ground because they can't get around. So it is

becoming a crisis proportions to me and it's difficult for me to purposefully plan to overload schools.

So I can advance with this today once I see a cleaner copy of what I just suggested for amendatory language, but what I would like, if it's alright with the two of you, is for us to continue this part of our morning activity to the afternoon and see if staff could provide us with a clean copy so we know what we're doing. I've made the language more rigorous.

BOLDT: I would like to continue it also, but I personally would…I guess on the process, would like to have us to give it a week so we're not going through what we're going through right now where we're getting even a clean copy, or whatever, for people to see at this very late moment. I think, you know, it comes to me…we've had this problem in wetlands and habitat where people are getting ordinances at the last day. They've got to have at least a week to see these ordinances. And I guess as far as comments, I appreciate the work that's being done. We're not there yet. And I appreciate the attorneys, the builders, and the schools. You know, we're in this spot and somehow we've got to get out of it. I think it would…if we did what the Planning Commission would have suggested, we'd have been right back here anyway. So we've got to handle it. As far as the schools, from my perspective, I'm glad we are addressing it. As Commissioner Stuart suggested, this is the first time we have done some of these things. I know when Commissioner Morris is gone to the state at the WSAC Steering Committee and said, geez, should the counties talk about education…how we should handle education, every county at that table has like a blank stare at her and saying, what are you talking about? Why should we do that? So if you ask me, we're the first county really coming up and doing at least something. This has never been done in the other plans. In fact, I don't think the other plans even acknowledge schools half the time, so at least we are doing something and the developers need to be acknowledged for that. The other one is, you know, a concern and hopefully the school districts…all the school districts, when they say they want to be in a partnership with this, they have to be in partnership with this and the essence is that I will come back to the reason we

address…a growth plan, in my opinion, is to have affordable homes. So to have the best education in the world and for students to go out of there to go to Idaho to live doesn't go well with me, which my kids, you know, went through Battle Ground schools; they can't afford to live here. So there has to be a happy medium and I think that hopefully the school boards acknowledge that they have to have kids to live here. So with that, do you have comments?

STUART: I'm happy to go ahead and continue this and I think it does make sense to give it at least a week to make sure that that we get all the comments that we need to get; that we get as much input as we need to get to make this right. It's a big decision. So general comments, first, on the positive side of things I think that we are seeing a change of the tide and with that comes struggles. With that comes a struggle against the waves and the waves of growth is bad, growth is good—the black and white discussions of the past have to stop. For any of those people who are in this room—and this is the bad side, this is the admonition—for anybody in this room who is not interested in finding a solution, please just let us know. Let us know that you either want growth or you don't want growth and you don't care how it's done. But for all of those of you who are in the room who care about how growth happens; that cares about making sure that we have good schools for our kids, that make sure that we have good roads for our people to drive on that are safe, for those people, please work with us. That's what we're working toward. When I asked the question about whether this has been done before by business owners—and that's what these people are, they're business owners, let's make no mistake—that these business owners have been willing to come to the table and talk about going further than anyone has gone before. And there's pain that's associated with that. As with any change of the tide, they get hit with the waves just like we get hit with the waves. And for those people who have participated in that partnership, God love you. You know, keep it up. We will. Today is not the end of the process. Today is only the beginning. It is the beginning of partnerships that we're creating. It's the beginning of working together as opposed to working against one another. Like I said, for all of those people who are in this room that care about that; that care about moving forward in a positive direction as a community with great schools, with a great

quality of life that will keep people here, not only just bring them here, thank you. I've proselytized long enough. We can continue on the details of this next week, if that's what you would prefer.

BOLDT: Thank you very much. The question is, is it possible to get something written up between several of the people within a week, two weeks, and give them one full week for everyone to look at this new ordinance?

LOWRY: There are a number of very specific issues that I think would be useful to be able to have discussions with the board on, give us some additional drafting instructions. If it would be possible to have a quick work session—I don't think it would take longer than 20 minutes or a half hour—we can try to put together a list of specific issues, get more feedback on, and then have a revised ordinance out very quickly after that.

BOLDT: Could we have a revised ordinance—we have a work session, not tomorrow, but the next Wednesday—have a revised ordinance by May 23 and have a hearing like May 30?

MORRIS: I think we actually do have time tomorrow. If I'm remembering, our work session schedule is very light tomorrow. Is that right? There's just one.

BOLDT: Can you have enough by tomorrow?

SNELL: We could take what you've provided for amendments and make the changes and have a work session tomorrow afternoon.

LOWRY: Well, we can also then develop a list of specific questions that we would like to get direction on.

STUART: That would work, I think from the standpoint of getting a little bit of direction from us, moving forward with a work session, then giving people in the audience and people who aren't here with us a chance to comment on a draft of something, with plenty of lead time so that we can get written comments in hand from people who want to be heard and give them a chance to be able to come and talk with us, based on something they've had time to review. And I don't care if we continue it to next week or the week after that. The 30th would be tough though because we're finalizing the Critical Areas Ordinances in our hearing so I don't know if that would be…

BOLDT: Could we continue this until the 23rd? Hopefully we'll have a work session tomorrow.

SNELL: Yes.

BOLDT: We'll have a final resolution for everyone to see by the 16th of May?

SNELL: Yes.

BOLDT: And then we have action on the 23rd?

LOWRY: Yes, and just a footnote, you called it a resolution and I'm intending to agree with the building association that it probably makes more sense to call it a resolution.

STUART: Agreed.

BOLDT: Okay.

MORRIS: Whether you call it an ordinance or a resolution, the language about the school districts have talked to the developers really ought to go.

BOLDT: Can I have motion?

STUART: You bet. Thank you, Mr. Chair. I move that we continue the public hearing on Urban Holding to May 23 at 10:00 a.m., and in the interim hold a work session on May 10, at…what time? 2:30?

[Inaudible comments from staff.]

STUART: Oh, 9:00 or 10:30.

BOLDT: No, work session, wrong motion.

STUART: Alright, I was just saying in the interim. Okay, so 10:00 a.m.

BOLDT: Second?

MORRIS: Second.

BOLDT: Thank you. It's been moved and seconded to continue the hearing on Urban Holding until May 23, making a note that we will have a work session tomorrow, Wednesday, and give one full week for people to actually see the resolution.

BILL BARRON: Will that be at 9:00 a.m. or 10:30, Mr. Chairman?

BOLDT: Tomorrow that will be at 10:30. Moving right along, we are going as quickly as we can to the Laurelwood Baptist Church. (See Tape 273)

PUBLIC MEETING: LAURELWOOD BAPTIST CHURCH
CUP2005-00007; PSR2005-00063; SEP2005-00143; EVR2005-00077; ARC2005-00100

Held a public meeting to consider an appeal of the Clark County Land Use Hearing Examiner's decision regarding the application for a Conditional Use Permit (CUP) and Site Plan Review approval to expand the existing church building to include a foyer, classrooms, offices, sanctuary, and other support facilities in the R1-6 zoning district.

The Board of Commissioners did not receive any public comment, oral or written, at this public meeting.

****Verbatim****

BOLDT: We will start with the Laurelwood Baptist Church appeal. This appeal is…could I have it quite please…excuse me. We are moving on with the Laurelwood appeal. It is an appeal on landscaping requirements. We will have no public testimony on that and for the record, I have read the pertinent parts of the record and I have also visited the site.

STUART: For the record, I have also read the pertinent parts of the record, and…for anybody, if you're having conversations, could we get you to take those out into the hall because it's hard to concentrate on this? Thank you.

MORRIS: I've read the pertinent parts of the record.

BOLDT: I just have one question of the appeal and the appeal on the decision…if I can find it here…on the landscaping, there's two decisions, A-1 and then A-1-3 – are they appealing both of them?

LOWRY: It's a bit confusing. The examiner chose to up the screening level to the north and west in condition A-1-A, which is [inaudible] noise. He did not then correct the specific landscaping requirements in A-1-C. So I think the appeal is to A-1-A, staff saying that in

resolving the appeal, you ought to also deal with the current inconsistency between A-1-A and A-1-C.

BOLDT: My other question would be on the west and…they're appealing…is it on the north and the west?

MICHAEL UDUK: The appeal is regarding the landscape scheme on the north and the west sides of the site.

BOLDT: Okay. And the north is bordering a street, right?

UDUK: The north borders a street, NE 6th Street that becomes NE 7th Street, and the west abuts Morning Glen residence.

BOLDT: And there's also a portion on the south that abuts a couple of houses, but that wasn't…

UDUK: The portion on the south abuts a future community park directly and the houses are on the other side farther south of the proposed park.

BOLDT: Okay. Any other questions?

LOWRY: One quick comment: I don't believe it's cited, either by the examiner or in the appeal documents, but the county code expressly provides for conditional use permits and planned unit developments that the county can require landscaping and screening that differs from what otherwise is applicable. So there's no question regarding the examiner's authority to require a level of landscaping that's greater than the code otherwise would mandate. The only issue that I

can discern from the appeal is whether there is an absence of evidence in the record that would justify the examiner's doing so.

BOLDT: What's the direction? Does one of you want to start?

MORRIS: Well, this is one of those instances where I don't agree with the examiner, but I can't overturn him because he does have a broader authority on his requirements than he would have were this just an outright permitted use and this particular hearings examiner tends to be vigorous when it comes to conditional use permits, so I don't find that there is substantial evidence in the record to overturn him.

STUART: I would agree with you, Commissioner Morris, and it's a little outside of the purview of our role in this quasi-judicial manner, but I also do think this would be a good situation for post-decision review and where there may be some…because I don't agree with what the hearings examiner came up with, but I don't make the determination based on whether I agree or not with their decision. I make it based on were there sufficient facts in the record to support their decision and I found that there were.

BOLDT: I think I would have to agree, reluctantly also. My reluctance comes from I'm not too sure if there was enough evidence in the record talking about the noise issue specifically being outdoors late activities, which I thought was addressed to us, but I'm not too sure if it was addressed adequately to the hearing examiner, unfortunately. I'm not too sure if I agree on that, but I don't think it was addressed that much other than the appeal letter that we got. So I think we are in agreement. The question is we also have to figure out…the examiner has two different standards here and…what direction should we give?

LOWRY: Staff's recommending that you simply amend Subsection 3 to be consistent with Subsection 1 so that they would both provide for the higher landscaping standards to the west

and north, and then you'd have an internally consistent set of conditions. It's clear that the examiner simply lifted the landscaping provisions from the staff report and made his change under noise so it's clear what the examiner's intent was.

MORRIS: And I think staff has suggested language on page 5 of the staff report. It's in the paragraph between 2 and 3 that reads, "Staff would request that the board clarify that the L4 Landscape Standard required in Condition A-1-A should replace Condition A-1-C, Sub. 1, and Condition A-1-C, Sub. 4, in the Final Order." So if we were simply to adopt the recommendation as modified…uphold the hearings examiner with modifications to the conditions for consistency's purposes as recommended by staff, that would get us where we need to be.

BOLDT: Just for clarification for me, staff is suggesting we have an L-4 landscaping on the north side along a road?

UDUK: Yes, Commissioner

BOLDT: I would sure like to figure that out. It makes no sense to me, that one.

MORRIS: Well, I don't disagree with you.

BOLDT: But I don't know how to get there.

STUART: I'm with you.

BOLDT: I mean to put 6 foot shrubs along a road—everything else is fine, but…

UDUK: Actually, historically before Morning Glen was developed there was a row of arborvitae on the north side of that road and on the west side, and so the develop of Morning Glen did alter some of the terrain and the existing landscaping on that side.

MORRIS: But it was on the other side of the street.

UDUK: The other side of the street was a row of private houses that the neighbors owned and 6th Street was basically a rural, rustic road at the time.

MORRIS: Who did the road?

UDUK: The developer of Morning Glen improved the road as part of the transaction.

MORRIS: This particular L-4 landscaping is intended to compensate for what was lost when the road went through?

UDUK: It's basically a response to a neighbor's objection, indicating that night lights and noise usually disturb her, so the examiner is looking for a way to provide some screening whereby late evening activities…people leaving the church premises do not unnecessarily disturb...the headlights on vehicles do not disturb this lady.

BOLDT: Living on the other side of 6th Street?

UDUK: Yes, that would be on the north side of 6th Street.

BOLDT: Even though there are one or two driveways going on 6th Street?

UDUK: Yes. Again, that is something that the Transportation Development Services staff may not have [inaudible] evaluated the situation.

BOLDT: You allow a driveway there it's going to have headlights.

STUART: Is that something that can be done through post-decision review to go back and take a look at that?

LOWRY: It could be. The difficulty is because this is a condition that was expressly added by the examiner, it would have to go back to the examiner in a Type III in order to modify it.

STUART: So it's a question of whether the applicant would want to even go through that again.

BOLDT: I'm personally good with everything, but, man, it doesn't make any sense to me on 6th and I can't even see anything on…

LOWRY: I guess a comment: the examiner's decision is unfortunately not much help in resolving this. This particular examiner loves to quote ad nauseam from testimony in the record and his findings are less than clear in terms of how he arrived at his decision.

STUART: Don't sugarcoat it. Tell us how you really feel.

LOWRY: [Laughs] I think the board would have the authority on this record to conclude that the landscaping adjacent to the road is not supported by substantial evidence—at least the examiner hasn't pointed it out.

MORRIS: That would be fine with me. This hearings examiner, as I said, is very vigorous when it comes to conditional use and he has all different kinds of style of presentation. You can never be sure. I mean some examiner's, as you read then, they're consistent, you can follow, you know where their findings are, you know where their conclusions of law are, you know where their exhibits were that they used. This one doesn't and every time it's like you start from scratch, and I don't know whether he has a new clerk every time or what, but I will tell you that just general this is one of the reasons why at some point in time we might want to consider taking churches which are a certain size out of the realm of conditional use. I mean, you see what hearings examiners' have done to some churches along the way. So I would be more than happy to overturn the hearings examiner on the application of the standard to the north side.

BOLDT: So would I. Would you?

STUART: Yep. Would you like that in a motion?

BOLDT: Yes.

STUART: Thank you, Mr. Chair. I move that we uphold the Hearings Examiner decision, except for overturning the decision on the landscaping requirements on the north side of the property.

MORRIS: For which we do not find substantial evidence in the record.

STUART: Yes.

MORRIS: I just decided that all of this Cedars 49 work is because that we just forgot to say something on the first one; I want to make sure we complete here. Are we complete?

STUART: Don't want boomerang.

MORRIS: Yes.

BOLDT: Do we have to replace that?

LOWRY: No, I think that's sufficient direction assuming that the motion incorporates making the internal correction that's staff recommended to the extent –

STUART: It does. We're here. You got it.

BOLDT: Thank you. It's been…the motion is made and seconded to uphold the hearings examiner's decision, with the exception of the landscaping on the north side as noted and with the direction of the prosecuting attorney. All in favor say aye?

MORRIS: Aye.

STUART: Aye.

BOLDT: Aye. All opposed? Motion carried. (See Tape 273)

PUBLIC MEETING: CEDARS 49 PUD SUBDIVISION (REMAND HEARING)
PLD2003-00048; PUD2003-00005; SEP2003-00092; WET2003-00033; HAB2003-00188; FLP2003-00041; EVR2003-00054; EVR2003-00055; ARC2003-00056

Held a public meeting to consider an appeal of the Clark County Land Use Hearing Examiner's decision in the matter of a Type III application for preliminary plat approval of a 20-lot residential Planned Unit Development (PUD) subdivision on approximately 5.32 acres zoned R1-6 in unincorporated Clark County, Washington and a related SEPA appeal.

The Board of Commissioners did not receive any public comment, oral or written, at this public meeting.

****Verbatim****

BOLDT: Okay, moving on to more exciting news, Cedars 49. We have an appeal in front of us on several issues of the Cedars 49 PUD Subdivision. This is not open for public testimony. We will make a decision upon the record. For the information, I have visited the site and I have read the pertinent parts of the record.

STUART: I will certify that I've read the pertinent parts of the record.

MORRIS: I've read the record…over and over again.

BOLDT: Are there any questions, first of all?

STUART: I do have a couple of questions for staff. The first one was there was information in there talking about that the applicant had not actually filed an application as of yet. Can you tell me what the status of the application is? I couldn't find it in the record and maybe I just overlooked it.

MICHAEL UDUK: I believe that what that pertains to is that after the preliminary approval were the [inaudible]. The applicant has not filed for the final engineering and plat review process. Therefore, the reduction in the number of lots from 23 to 20…we don't have new plat maps showing 20 lots, but we are still using the old regional preliminary plat. So our understanding is that the approval…the number of lots has been reduced from 23 to 20.

STUART: And that has been done without any plat approval and, like you said, we're using the old plan maps on that?

UDUK: That has been done as part of the public hearing process.

STUART: Okay. The second question I have—and it's probably a question for you, Mr. Howe—the question relates to the staff information. There was a lot of discussion within the appeal about what was relied upon, what was not relied upon, where the information came from. The hearings examiner relied upon…it seemed like this hearings examiner was relying upon changes in code interpretation based on the previous board decision. Is that fair to say? I guess that's a legal question, and then I have a question for you.

CHRIS HORNE: The examiner clearly relied on the board's prior interpretation of the habitat conservation ordinance, as he should. This board has the authority to make a de novo review of the interpretation of the statue and interpret it itself and the examiner did, in fact, implement that. I think there is a question as to whether or not the examiner felt the board was making findings that were intended to be binding upon him…actually, as long as we're talking about findings, one of the issues for the Superior Court was, in fact, once you make a decision that you incorporate those portions of those examiner's findings and conclusions that support your determination so the Superior Court will know what are the findings and conclusions that support the decision. So just to put in the back of your mind when the motion comes around, that will be an element that you'll probably want to discuss. One of the questions or concerns that were raised was whether or not the board in their first review of this and its interpretation of how internal riparian buffer averaging could be implemented and whether or not staff's interpretation was correct or whether the examiner's interpretation was correct, the board concluded that, in fact, the process as sought by the applicant and endorsed by staff was a correct interpretation that the examiner had misinterpreted the ordinance. So that's the legal interpretation question. But there was a question as to whether or not in doing that the board also made findings improperly and that is an issue that has been re-raised by Mr. Hirokawa on behalf the applicant and responded to by Ms. Bremer on behalf of the developer.

STUART: And between the times when you first provided interpretation and before it ever went to a hearings examiner and the board the first time around and after it went to the hearings examiner and the board the first time around, were the additional fact that you brought to bear, were there additional interpretations you brought to bear? What were you asked for?

DAVID HOWE: There were no additional facts or interpretations that were brought to bear.

STUART: So the initial determination, the facts that you brought to bear, there was nothing added to that?

HOWE: Correct.

STUART: Thank you. Those were my questions.

BOLDT: Questions? Okay. Thank you. Does one [of you] want to start?

STUART: I can start and just kind of start along the path. The reason I asked those questions…and I really look to guidance from you, Commissioner Morris, because you were here, but it seems based on the record that I've been able to ascertain that the facts that were brought to bear initially did not support the mitigation as proposed; that the board then determined that using those same facts, but interpreting the code differently—which is our purview—but interpreting the code differently that the mitigation would suffice and then so it moved forward. My question is simply, if the facts didn't change and the interpretation changed, of those facts based on just a different interpretation of the code, what authority do we have at that point? And my basic sense of it is that the facts are the facts and that even with the interpretation of the code that the former board adopted, that there was nothing that the hearings examiner told me in the decision when it moved forward from the last…I'm getting a

little confused…but after it went to the Board of Commissioners and when it moved forward, I didn't see any evidence brought to bear…any factual evidence that supported that the new interpretation should change the result. I guess that's the bottom line for me and that's what I…I didn't see that.

MORRIS: Let me give background on this—and I should probably say that the other day Commissioner Boldt did ask me something about the background on this and I said that it had been in front of us before and I couldn't remember, but I thought it had to do with the horseshoe shaped mitigation plan and that it had been here twice. I'm going to talk for a little while and I will ask for a transcript of today. As I go back and read all of this and I remember, I believe we are here today because of things that were left out and left out of the record in front of you and in front of us are verbatim transcripts of the board hearing, which the court had. Absent from our record…left out of the record that we had, which I had to ask for yesterday were even minutes of the board meetings. Missing from our record were the documents filed in the court to which Judge Johnson responded; we did have Judge Johnson's response. Judge Johnson sent it back to us because of something that was left out. The first time the board heard this, the board left out of its motion that we overturned the hearings examiner on the matter of the riparian habitat ordinance and we left out and we adopt his conclusions and findings in Appendix A. Had we added that into our motion at the time on '04, after having read the court documents, I anticipate we would not be here today because what Judge Johnson told us we hadn't done was to provide findings. Those findings were supposedly provided by the hearings examiner; however, they were left out by the hearing examiner when he issued his opinion and only were provided later as a part of the staff report. So the hearings examiner left out his findings and conclusions were we to overturn him, the board left out the motion including them in the comments…I mean in our overturning language. The hearing itself the first time around was an interesting one. It was the hearings examiner's first experience with the habitat ordinance. Please keep in mind that it was far from the Board of County Commissioners' first experience with the habitat ordinance that indeed the Board of County Commissioners—two of us—had

been a part of the construction and the adoption of the habitat ordinance, and all three of us had been working with the ordinance primarily in appellate roles for at least four years, two of us for five. Mr. Howe…we had worked with the habitat ordinance at the appellate level through both Mr. Howe and his predecessor—there had been two habitat biologists; Mr. Howe had been working with it for about four years. During the testimony that particular evening, there was a lot of discussion about endangered species and the hearings examiner didn't seem to understand the interconnection and the separations between the habitat ordinance and endangered species and ignored, quite bluntly, evidence from Mr. Howe and WDFW that there were no endangered species in those sections of Curtain Creek. There was a question at the time about Mr. Howe's credentials because at that time Mr. Howe hadn't gone through the business of saying how long he'd been dealing with this or what his credentials were and the primary testimony, if I'm remembering correctly, against the application was from a gentleman who was a teacher at the University…or Portland State University who was a botanist, not a biologist. So all of that would have emerged had you had the verbatim transcript from the very first board hearing because we talked about that a lot.

So it was, I think, remarkable that the board…that particular board, which disagreed so frequently, agreed so quickly and so easily on overturning the hearings examiner on the provisions of the habitat ordinance. That board did not misconstrue the law of the habitat ordinance. The hearings examiner misconstrued the requirements of the habitat ordinance and because he misconstrued the meaning of the habitat ordinance—it was his first time around—he made findings that suggested the level of proof had not been met, which was not the case in the board's reading of it because there was sufficient evidence from Mr. Howe that everything sufficed. There was no change in findings. We just didn't take action on any. The board referred on the matter of the category of the wetlands and that is what resulted…I mean the board remanded on the category of the wetlands, which is what resulted in the change in the number of lots that were being allowed. When it came back to the board the second time after the remand, we again adopted the hearings examiner…we upheld the hearings examiner's decision and I

think we thought that meant that we were adopting his findings and conclusions all the way through because we adopted it, but Judge Johnson apparently stopped after the first appeal and didn't move on to take into account that when we had upheld him the second time, we had upheld everything the second time. So then we the last time around just sent it right straight back to the hearings examiner again, who wrote a kind of grudging opinion, quite honestly, again challenging the former board's understanding of the habitat ordinance and then the attorney for the appellant this time around has once more audaciously challenged the former board's understanding of the habitat ordinance. In the second hearing, there was a lot of discussion about the habitat ordinance and whether it was adequate or not, and both Commissioner Stanton and Commissioner Pridemore observed that there were changes that needed to be made to the habitat ordinance, but that the hearing forum was not the venue in which to make those changes and that indeed they should be suggested as the habitat ordinance proceeded through the amendatory process as required by GMA, which has been happening although I don't recall seeing—as a sidebar comment here—any suggestions from the appellant's today about how that habitat ordinance [Side A ends] acceptable to you. So we would look forward to those.

In general, I am ready to again uphold the hearings examiner. I want to make sure, Mr. Horne, that our conversation is complete, articulate, leaves out no detail, so that we cannot be misunderstood. The first time around when the hearings examiner was suggesting Mr. Howe didn't know what he was talking about, I think all of the board having worked with Mr. Howe for as long as we had sort of chuckled internally at that, but he sort of said it again this time in this decision, which I find unnecessary at best. And so it came down, I guess, to whether you were going believe when your staff experienced biologist says the plan suffices to meet the requirements of the ordinance and a botanist says no, it doesn't, the former board relied on staff and their own understanding and their own experience of the habitat ordinance. One of the things that I appreciated in the applicant's response brief was the separation of the issues between those that are factual, those that are legal, and those that are a mix of both, and I stand

firm that the former board did not misconstrue the threshold standards required to meet the test of the habitat ordinance way back in 2004, and that really continues to be the issue in front of us today and that we need to go back and remedy some of the things that we left out, like adopting the hearings examiner's Appendix A.

STUART: I have a legal question. My question is, the hearings examiner…I know our standard of review requirements for upholding or overturning a hearings examiner decision, I understand those. What standards did the hearings examiner need to follow for upholding or overturning a Board of County Commissioners decision?

HORNE: Well, the board…let me see –

STUART: The board sends it back to the hearings examiner, the hearings examiner agrees, what standard do they have to meet to agree or not agree?

HORNE: Okay. As it relates…let me divide those out into the three areas that typically raise issues generally. As it relates to findings of fact, the examiner determines the findings of fact or what facts to find, the [weight] to give the credibility to give to evidence that is presented to him and the board, quite candidly, cannot change that. I mean, the examiner is given the final authority to determine the credibility to give to the witnesses and how findings of fact are to be reviewed. Now the board's appellate authority is that you can find that there's not substantial evidence, as you've just found in the previous case, and that based on that you can remove a condition that is not supported by substantial evidence. But if there is substantial evidence on two sides of an issue and the examiner goes one way, his decision rules. When it comes to the application of law to the facts, the examiner is…under LUPA and under regulatory reform, makes the determination…the initial determination of findings of fact and then applies the law to them. The board can reverse or modify that determination if you find that he clearly erred or the examiner clearly erred. As it relates to legal interpretations—the habitat ordinance and what it

means or the particular provisions of it mean—you have the independent right to interpret the habitat ordinance and the examiner is bound on remand to your interpretations of the habitat ordinance.

STUART: Okay. So when applying facts to the law of the case…so board says our interpretation of the habitat ordinance is different than the hearings examiner, we think that it says something different, which is the board's purview, they base it on…does that have to be based on anything? If it's not based on anything, can they still be upheld at the hearings examiner?

HORNE: I'm not sure what it is based on.

STUART: If we say we are going to…we interpret the habitat ordinance to be different than the initial hearings board decision…or Judge Johnson…we say, we think it says this and we were there, we know, and if we don't give any facts to back that up, where does…what kind of authority does the hearings examiner have at the point? What are they supposed to do?

HORNE: I think the examiner is bound by your interpretation. You as the authors are given the…as the final entity…charged with the authority of implementing the ordinance. Deference is given to your interpretation of the code. If it's clear…if it is crystal clear and not ambiguous, a court will once again has the right to independently itself apply the law. It will define the terms, it will…if they're in the dictionary or it will apply it. To the extent that there is any question about what the effect of that ordinance means, the land use petition act, or LUPA, tells the court that it was required to give weight, give due deference, to your interpretation as the final entity charged with implementing this regardless of…I mean, certainly the more background you give and the things Commissioner Morris has said provide additional basis for the court to give due deference to yours, but LUPA says that you as the final implementing agency are entitled to due deference in your interpretation of the ordinance.

STUART: Okay. And the final then step in that for me is so interpretation has been given, due deference to the board, now what requirement does the hearings examiner in applying that new interpretation to the facts of the case?

HORNE: I think the concern of the board—I don't want to speak for the board, but my assessment of having read all these briefs now recently and for the second or third time—the board was concerned that a number of the findings that the examiner made…or a number of the conclusions that the examiner made were flawed based on his interpretation of the ordinance and in sending it back, asked the examiner to reconsider this action based on this corrected interpretation and the extent to which it might have affected his determination.

STUART: And I guess the ultimate outcome of all that line of questioning is, I don't find that it was done. I still don't find that the hearings examiner did the work of applying the new interpretation of the code and what you said, Commissioner Morris, makes it clearer to me, the history of this, but a lot of what you said wasn't on the record. A lot of what you said –

MORRIS: Yes, it was.

STUART: – wasn't in the record that I have seen.

MORRIS: No, it wasn't in your record and that's why we don't have…again, we are here discussing more things that were left out than things that were included.

STUART: Exactly.

MORRIS: So in the future we need to have included in all of remand issues a transcript—a written transcript—of the board's deliberations and when we have something that's been referred to us by the court, we have to have all of the accompanying documentation.

STUART: And that is why for me I can't agree with upholding the hearings examiner because the hearings examiner didn't do the hearings examiner's work. And I know that it seems like a really circular way of going about things and you keep bouncing it back like a tennis ball across the court, but for me there has to be…somewhere in the record there has to be substantial evidence to back up what the hearings examiner is doing and for me it wasn't included in the record that we were provided with. So if the information is there, if there is information out there, then the necessary step is for that information to be put in by the hearings examiner so that we can move forward and have it not come back again because otherwise there's still holes, is the way I see it.

MORRIS: Well, with all due respect…with all due respect, Commissioner Stuart, there is…I don't know even how to deal with what you are saying because if you are suggesting that this be remanded to the hearings examiner to do different findings of fact, those findings were included in Appendix A, which is a part of your record. And so he has made those findings; you must adopt those findings. There is repeated evidence in the first notebook from Mr. Howe about the sufficiency of the riparian plan. There was long discussion about the number of lots at the first hearing because the number of lots mattered. The hearings examiner…let me see if I can help you out…the hearings examiner seems stuck on the buffer averaging provisions and that somehow or other you're not supposed to infringe on the riparian area for over 50%. The hearings examiner appears to ignore, in his scheme of values, the fact that the riparian area is actually increasing. The remand on the riparian zones issues was never sent to the hearings examiner; the only instruction to the hearings examiner, and the only remand issue to the hearings examiner the first time around, was on the nature of the wetlands. I mean that's very clear in the minutes, but unfortunately you weren't given the minutes. I mean, Mr. Horne, this is

really a very disadvantageous discussion when the key stuff that should have been in the record isn't in the record and, I mean, I don't even know how it isn't in the record and I don't know how you amend the record at this point in time, but everybody in the universe had access to it. It's clearly a part of the existing documentation in this discussion.

STUART: And I certainly wouldn't…I don't challenge the fact that the facts have been established and that they're in…that the basic underlying facts are in the record—that's not the issue for me. The issue for me…the issue is how do you use those facts and apply them to the new interpretation…not new, but the interpretation that the board had gave to the habitat ordinance and how that application created a different decision, not by the board, but by the hearings examiner? I get that…I mean that there's just holes that I would want in the interpretation filled by the hearings examiner.

MORRIS: The hearings examiner did that. The hearings examiner did that the first time around and it is…let me see if I can find it in your record –

STUART: But the hearings examiner in the first time around came to a different determination.

MORRIS: He did, but then he also…because the board consistently asked him to make findings in the other direction, he did.

STUART: I just didn't see anywhere in there why he changed. That was my issue. I just can't come to it.

MORRIS: Okay.

BOLDT: Okay. Well, I guess for my part I must have to agree with Commissioner Morris on that. Looking…and I guess I've read so much stuff in these three notebooks, I can't tell you

where it was, but I read the minutes of the past board and I specifically read, no offense, Commissioner Pridemore's comments on I think he went through a series of the issues and like you said, you all agreed. It comes down, to me, that first of all the best available science issue clear throughout this has got the fall essentially on us for good or bad. That's why we have staff…you know, it hasn't been addressed in the state so it comes upon us to make that decision, and we made that decision. The other one is that for my interpretation is that yes, the board did reverse the hearings examiner on its opinion of the habitat ordinance, but I come along that the purpose of the habitat ordinance as we see it now had a defined a purpose. The last board really informed the intent of that purpose, which, maybe off the record, is why I like intent sections rather that purpose statements because it is the intent of the people who made the decision that is a law of this county just like it is the intent of the legislature makes the law of the state of Washington. So that's the intent. It was clear that the board actually made the law; the intent of that board carried through of that decision. So with that, I would be supportive of also upholding the hearings examiner's decision.

MORRIS: I think we need to work our way through some of the appellate issues so we don't find ourselves leaving out things and if you would help us with that, Mr. Horne, it would very helpful.

HORNE: Certainly.

MORRIS: I guess that one of the easiest ones to dispense with that I can think of is the appeal that…the issue that this is actually a rezone. The hearings examiner did not, either in this instance or either of the two prior ones, agree on that. If it were to be a rezone, we would have to have a zone called planned unit development, which we do not. Planned unit development is a type of development; it's a way you put residential together on a lot and that's all it is.

HORNE: In Clark County that may be true…for the purposes of this application, that may be true and that is exactly the reason why we believe staff was correct in concluding that this PUD does not have to meet the rezone criteria that were discussed by the appellant in this case. What the board needs to at least recognize is that sometimes PUD's attempt to apply or seek approval for uses that are not allowed under the zone and code and to the extent a PUD does attempt to change uses that are not otherwise authorized—in fact they may well constitute a rezone and change of circumstances may be required. In this case, because these are permitted uses, then that is not an issue we believe and there is some appellate authority to support that conclusion. So we agree…we do not believe this is a substantial issue and we believe the examiner correctly dealt with it and the judicial interpretations support the examiner's determination on the PUD in this case not being a rezone and, therefore, not having to meet the criteria for change in use.

STUART: Would you like to deal with them separately or do you want to kind of wrap everything in together, Commissioner Morris?

MORRIS: It's probably more…it's probably better just to go down them one by one, the appeal issues.

STUART: I actually agree with the interpretation on that point. So would you like for me to kind of move?

MORRIS: Yes, please.

BOLDT: Yeah.

STUART: Thank you, Mr. Chair. I move to uphold the hearings examiner on the issue of whether the PUD is a rezone.

MORRIS: Are we going to take them individually?

STUART: Is that what you…I thought that's what you were thinking we should do.

MORRIS: No, just work…I was just going to work through them individually.

STUART: Oh, okay. That's fine.

BOLDT: Okay.

MORRIS: We can do them the other way if you like.

STUART: No, no, that's fine. I withdraw the motion.

BOLDT: The next one?

HORNE: The appellant has raised as an appeal issue as to whether or not the examiner erred in failing to recognize, or take into account, the substantial body of evidence amassed in opposition to the examiner. That is, I take that challenge to be that the appellant challenges whether the examiner's decision is supported by substantial evidence. As I indicated, the examiner has the right to weigh evidence and give more credibility or less to competing, but equally credible, evidence in reaching its conclusion. The examiner…I mean the applicant…or the appellant, excuse me, has provided some significant information that they believe warrants the rejection of this application. The examiner approved it based on evidence provided by both the applicant and, as filled in…the gaps of which were filled in by staff—either Brent Davis or David Howe on behalf of the county. There is lurking…I'm reluctant to say this, but there is at least lurking out there an issue as to whether or not the examiner felt that the board made factual

determinations that bound the examiner, and I have to at least tell you that because it's going to come up. So in this whole decision, the question of substantial evidence will be one of whether or not there was substantial to support the decision and whether or not the board had made in its first determination any kind of factual determinations that it intended to bind the examiner with, and that is an issue.

MORRIS: Would you say that once more please?

HORNE: Certainly. There's really a twofold issue. The first issue…denominated issue [inaudible] by the appellant, Mr. Hirokawa, is whether or not in light of the evidence it produced, whether or not there's substantial evidence to support the examiner's determination. As a part of that appeal is a question of whether or not the board at its first appellate hearing made a finding of fact that bound the examiner and that thereafter was relied upon by the examiner in the approval of this project. That is a question that has been raised by the appellate throughout this and is at least discussed to a limited extent in the hearings examiner's decision.

MORRIS: About findings of fact?

HORNE: That we're alleged to have been made by this board, that may have affected his decision. That's correct.

MORRIS: Can you refer me to that because I'm reading it?

HORNE: Certainly. On page 8 of the examiner's determination, if you start with the small case "a", bottom of the second paragraph, "while the board was not clear while their discussing the interpretation of the ordinance….," but I'll start up a little bit further – "While it is still difficult for the examiner to see how provision of a wetland area that already has to be preserved in order to comply with the county's wetland protection ordinance can be deemed suitable mitigation for

the loss of riparian habitat due to the storm water facility, that is staff's expert opinion and the board explicitly accepted it finding. There is substantial evidence in the record to overturn the hearings examiner's decision on the habitat permit because the proposed mitigation measures are adequate and can comply with the habitat conservation ordinance and the statute." The specific provision…or the portion that I was going to quote is, "that while the board was not clear about what evidence it was relying upon, it clearly made both an evidentiary and legal determination." The examiner later says that he feels compelled to follow this factual determination that the board made. If you look at page 10, the last paragraph before paragraph D, he makes some…it's a little bit less clear, but a similar reference that may cloud this whole factual issue determination, quite frankly.

STUART: That's where I get bollixed up.

HORNE: Believe me, I…

MORRIS: No, no, you're right. You're absolutely right because all the way through this the hearings examiner has made it abundantly clear that he did not agree with the board the first time around. The board the first time around understood the threshold of meeting the test of the habitat ordinance at this stage in of the game. Now if we didn't articulate it, if we didn't accept the findings that the hearings examiner says he provided in Appendix A, I don't know how we remedy that. The board the first time around…there's no other way to say this, the hearings examiner just didn't know what he was talking about, and he committed that to paper, and somehow or another we are still struggling with what was an embarrassingly inadequate understanding by an officer of the court, in a way, of the code. He repeatedly commented about the wetland and the reduction in the habitat buffer by volume. He didn't refer to function and value, which is what the habitat ordinance is about. Mr. Howe's correspondence and his comments spoke to the ordinance…essentially what Mr. Howe said is really this habitat is just kind of ordinary and it is not that hard to replace and the kinds of creatures that live there are

the kinds of creatures that obviously can adapt to urban environment because this is surrounded by urban environment. I guess that I wouldn't have suggested at the time that there was reasonable evidence in the record for the hearings examiner to have reached the conclusion he did, except by virtue of simple measurements and yet, Commissioner Boldt, the intent language of the habitat ordinance—and there [inaudible] in that language—says it is the intent of the board that this be applied with flexibility and attention to site-specific detail. The application came back with more riparian zone. The hearings examiner approached the discussion as though somehow or other wetlands and riparian zones never the twain shall meet. Well, they do all the time. He sort of said that it didn't meet the threshold because you can't double-count. Well, the language doesn't say you can't double-count. If you begin with a bad understanding of a piece of code and you have the authority to write that misunderstanding down…and even his first decision wasn't all that well done. I mean, it didn't improve as it went on. In terms of findings of fact, what he keeps saying is that you're double-counting and that you've reduced the amount of zone, but the fact is it wasn't reduced. It was increased. I don't know how you get around this, Mr. Horne, and I'm most anxious not to get this back again so if I have to sit here for hours to figure out what exactly needs to be said, I'm more than happy to do it because I don't think I have been more certain than today.

BOLDT: My question is, so the hearings examiner refers to the last board that overturned the examiner, saying that he did not have enough evidence; however, the board did not provide their own evidence.

HORNE: Correct.

BOLDT: We just came from a hearing where I said the hearing examiner was wrong in the landscaping requirement. I didn't provide a transportation light study to back my findings up. I don't see any difference between that and this, in a way, you know of decisions…any decisions that we overturn the hearings examiner, it's kind of a gut decision of he didn't have enough

finding, but we've never really…it'd take forever to do hearings to provide our own evidence to back up our decision.

MORRIS: You know, you're really edging close to the truth here. We didn't find new evidence in the record. We said he used the evidence and he misconstrued it against the requirements of the code. That's what the board said the first time around. We made a decision about the code, not the decision about the evidence that he had in his decision.

HORNE: Where the confusion I think came was the follow-up language in the board's resolution that says, and I'm paraphrasing, that the applicant has complied with the habitat conservation ordinance, is a determination…it is a conclusion that as applied to this case and the facts that exist, that the particular application meets the terms and conditions and that's a determination that the examiner is charged with making initially and that the board is charged with the obligation of reviewing and reversing if they find it was clearly erroneous. But as it relates to the findings—and going to Commissioner Boldt's specific issue—there is substantial evidence in this case that was presented opposing the project and there were some findings. Those findings may have well changed based on the corrected interpretation of the ordinance. The problem that will come up in this case—and, again, I struggled to say this because I know the implications—but the question I can guarantee you will come up before Judge Johnson is going to be whether the examiner was right, wrong, or indifferent, he specifically says no less than about four times through this decision that he felt bound by factual determinations that this board has made and, therefore, he reluctantly, begrudgingly, or whatever term he used, adopted those as the basis for making his decision. This board concluded that it was only making a legal interpretation and if nothing else the court's going to come back saying that nobody's made a factual determination addressing these issues; it's the obligation of the hearings examiner, so do it hearings examiner. That is at least the issue I anticipate having to litigate if we go back to Superior Court, and I'm going to be even more reluctant to say this, but if we don't make the

examiner specifically enter findings based on this new interpretation and the facts as they existed in the record…as they exist currently in the record, I'm just giving you my honest opinion.

STUART: That's a much more concise way of putting what I was struggling with and what I've been struggling with.

BOLDT: So your recommendation is?

MORRIS: To send it back to the hearings examiner?

HORNE: The board has a couple of options. If the board is concerned…well, the board has a couple of options. I don't want to go too far. I think…my legal opinion is that the examiner erred in failing to render findings and including with his decision determinations that he says are based on findings made by this board. The state law makes it obligatory, and I thought the resolution on remand made it clear, that the board doesn't enter findings of fact; that's the job of the examiner, and that he was supposed to do that. However, in light of the language that's in this, I think the only defensible way to resolve this—unless the board can conclude that there is no substantial evidence that could support other than an approval of this project—the only defensible…the only clear way to defend this project would be to send it back, tell the examiner that he is obligated to render findings and conclusions; that the board sent it back on the first remand for the sole purpose of requiring a re-interpretation and the wetland delineation that has already been resolved…or wetland determination, which has already been resolved—everybody agrees it's a Type III. But that the board never intended and does not intend to make findings…or did not intend to make findings—and that's the province of the examiner—and make him do what state law charges him with the obligation of doing, which is entering findings and conclusions based on the evidence that this board can review.

The other option, if the board is concerned about the examiner on this project—although it might even take longer—is to remand it to a different examiner to start over with the record. Under state law you can only have one open record review, but presumably…and this has happened occasionally—rarely actually—in judicial courts where there's a concern about partiality that the court sends it to a completely different judge and has a new judge look at everything else, but all over again. That's a pretty draconian approach, but certainly that is a second alternative that the board does have. Otherwise, we would recommend you…specifically we can clarify this even more in the resolution, but that to the extent the examiner seems to be deferring to what it perceives as findings by this board, tell them the board did not make findings, that it's the examiner's obligation to make those findings and to do it.

STUART: And my sense as far as sending it to another hearings examiner, I mean, if we're that concerned about the hearings examiner's impartiality, then we need to be looking at a new hearings examiner as opposed to just sending this case so unless that's…unless it's some sort of general problem with this hearings examiner, which I haven't heard, but if it isn't then I would certainly be really reluctant to send it to a whole new process. That's seems huge.

MORRIS: Well, I have a problem with this hearings examiner and I definitely think that that's a discussion that we need to have. This hearings examiner is not going to make findings at this point that there is adequacy unless we instruct him to do so in the resolution.

HORNE: And you can't do that.

MORRIS: You can't do that. I don't know how to make this anymore clear…perhaps the original board should have said that we do not find it reasonable to substitute the assessment of a botanist for the assessment of a biologist because the test is, was there sufficient evidence in the record to substantiate his decision, and the testimony of a botanist was not and, again,

maybe if we had the verbatim transcript of that first hearing, we would find that…or if we had it because there was discussion that day about the testimony coming from a botanist and not a biologist and that we took the botanist's testimony more seriously when it came to the wetlands issue and that's why it went back to determine the wetlands and the height of the trees, and a whole lot of other stuff. But if this hearings examiner does not understand the habitat ordinance, he simply will be unable to make findings that believe [inaudible] hit the threshold.

STUART: And my sense of it is is that, like you said, there is lots of facts on the record; it's a matter of taking the interpretation of the former board seriously and saying this is the interpretation of law of the former law. Now the hearings examiner's job—and correct me if I'm wrong—the hearings examiner's job is to look at the facts and apply them to that interpretation of law. You don't get…the hearings examiner is not going to change the interpretation of the habitat ordinance; they've got to use that. But that what we have to make clear…what we would have to make clear to the hearings examiner is do it, do your work.

MORRIS: Well, then maybe what needs to be done—and I don't know how you do this—is to specify what the old board said about…because the old board said, yeah, you can reduce below the 50% threshold as long as you maintain or enhance the function and value because he gets stuck on that 50% issue and he gets stuck on the double-counting and he can't get around those two, and so, you know, the old board can't send that clarifying message unless it is implicit in the minutes of the discussion.

HORNE: Well, the actual…the transcript in terms of what this board sees and in terms of what Judge Johnson saw, I have to maybe apologize because transcripts of all your prior proceedings, including the hearings examiner's proceedings, were transcribed and those are part of the court's file.

MORRIS: Yes, and she specifically says that we did not make findings. She says that. She says we didn't even bother to adopt his.

HORNE: And, again, understanding that this is a very difficult area because if you adopt findings in an appellate context, you've been reviewed twice in the Court of Appeals for doing that whether based on new evidence and so we have argued to the court on every occasion this issue has ever come up that where the board adopts findings, that they are only findings in support of its decision; not intended to be findings of fact, which are typically what are reviewed in land use decisions. So the board is clearly acting in appellant capacity, don't make findings of fact…you don't make findings, other than those findings necessary to explain how you got from point A to point B in your decision, but the decision is rendered and reviewed based on the record created before the examiner and the findings and conclusions generated by the examiner. But we do have the record and we can make clear from the transcripts from your original hearing what you said, or we can make it clear based on providing the board a transcript and we'll do it by the resolution, if the board chooses to take any kind of remand action in this case. I'd just inform you that those are alternatives for you.

BOLDT: Mr. Horne, the hearings examiner has essentially approved it. If we remand it back to him and ask for findings, but yet you just said we can't tell him what to do, but in essence we're telling him we don't want to tell you what to do, but [inaudible] make a findings on the things we agree with…

HORNE: No, obviously you can't do that.

BOLDT: I know. [laughs]

HORNE: I mean that's the one thing you can't do. What the examiner said, and what the concern of the court will be, is that the examiner said on a couple of occasions I feel compelled

to reach this conclusion because the board already found fact A. What we would instruct the examiner is the board did not find fact A; it's your obligation to find the facts and to render conclusions based on those facts, and the board's obligation is to review your determination and find out whether it complies with the law; and, generally speaking, we've already talked ad nauseam about what those standards are and so to ensure that by the time this gets to somebody else, that we can point to findings that nobody can say are this board's findings, but are the examiner's only. That's where this issue will…at least…procedurally—I mean there were was obviously the substantive issues—but the procedural issue that will cause the most immediate concern, I am afraid, is this question of whether or not the examiner felt to compelled to enter conclusions based on findings this board directed him to make or follow.

BOLDT: So we remand it back, he makes his findings, discovers oh, he should reverse his decision, it comes back to us…we're back in the same situation of you and two year's ago and whatever.

HORNE: That could—and I don't want to mislead the board—that could happen and to the extent it does…again remember—and I'll address your concern, Commissioner Morris, about the weight of testimony of Mr. Howe versus Dr. Bishop, the examiner as part of his obligation to enter findings, weighs credibility and he could well conclude that Dr. Bishop's evidence weighs more than, or should be given more weight, than Mr. Howe's. No disrespect intended to anybody, but that could well happen and that's part of his job and if he does that you could well wind up in a situation where this decision is reversed and the board would be put in the position once again of deciding is there substantial evidence to support his decision, is it a clearly erroneous application of the law to the facts, and did he correctly interpret the statutes? But at least you'd have findings. If you do not have findings…his findings, I can tell you that we have a problem.

STUART: I'll make the motion. I don't know if I'll have a second, but…

MORRIS: What, to remand?

STUART: Yeah, for the purpose of clarification only, and I don't know what the wording is, but…

MORRIS: The first remand resolution reads, "The board concludes that in the matter of Cedars 49, there is sufficient evidence in the record to overturn the hearings examiner's decision on habitat permit because the proposed mitigations are adequate and can comply with the habitat conservation ordinance." That's what it says.

HORNE: That's correct and the issue that…the issue that would come up, or the legal argument that Mr. Hirokawa did and will make is that it is not up to the board to determine whether or not there is compliance with the HCO…the habitat conservation ordinance, but the examiner's job. And that the board can tell him he misinterpreted the ordinance, but whether there's compliance or not has to be a determination made, first of all, based on the facts as weighed by the examiner and second of all, as he applies the statute to those facts. And so the question that would arise through the appellant's in this case is whether or not the board went too far in issuing the remand with that very language that you quote.

MORRIS: Who wrote this language? [laughs]

HORNE: I'm not going to say anything, but I didn't signed the Approved as to Form.

STUART: I'm not going to say anything, but it wasn't me.

MORRIS: You know, I almost have to say at this point in time that I think it's cheaper for the applicant to withdraw their application and start again, because this could go on ad nauseam,

I'm serious, this…read the language in this hearings examiner's decision. He is not going to reverse his findings of fact, and that's it. I mean, you can just read the tone in it. The first time in his decision, he didn't talk about evidence to support his decision; he only talked about lack of evidence that had been provided by the applicant and Mr. Howe. His first decision didn't cite evidence either. So it's like nobody wants to talk about the evidence. His first decision talks about over 50% reduction and double-counting. He doesn't even refer to the…I mean it was just a really bad writing. I mean, he doesn't talk much about what the discussion was about. It was a long hearing; people talked a long time and his first decision, you know, you would have thought he got through in thirty minutes. So he didn't find that it didn't…I mean he just found that there wasn't anything he liked. He set his own test, his own threshold in the first discussion, which was based on his interpretation of the ordinance, which was wrong. I need to go back and find that again. I think I've read it too many times.

HORNE: His decision is at Exhibit D of the –

MORRIS: Is that the first decision?

HORNE: Yes, it's the March 23, the real thick book—March 23, 2004, it's Exhibit D is his decision, and he starts out talking about the habitat conservation ordinance at page 7, I believe.

MORRIS: It's also in our first notebook…or in the most recent notebook. Maybe I read him wrong. You see, in the middle of that paragraph, he quotes staff on page 9. He goes on to talk about the applicant on page 10 and how short their's is and then he says, he says in the last paragraph before D on page 10, "At the end of the day there is no factual evidence in this record to support approval of the riparian habitat mitigation plan, or the conclusion that the two functional criteria are met. There is only staff's expert opinion, which can be summarized by saying that the site's riparian habitat is already so impacted by human activities that not much is required to mitigate for its loss. The board's first decision apparently rested…," – oh, this must

be his second decision I'm reading, "the board's first decision apparently rested on this thin evidentiary **[tape 273 ends]**…but what does he say in his first one?

HORNE: Actually, the first decision is only two pages as it relates to habitat.

MORRIS: Right. There's nothing.

HORNE: Well, I may be wrong. It starts on page 7 and concludes on page…halfway down page 10. But the problem is ultimately to approve this project, the applicant has to prove it does comply and if there's a lack of findings that it does comply, that…the lack of evidence by the examiner doesn't equal approval; it equals remand.

STUART: Do you feel like that there could be a resolution from us crafted tightly enough that would require that work to be done?

HORNE: Sure. I'm…yes. The answer to your question is yes.

MORRIS: You see he says based on the…he begins his discussion by saying, "based on the requirements of Clark County Code Chapter 13.51." He concludes that the applicant's riparian buffer averaging plan is unlawful and violates the approval standards. And then he goes on to talk about the 200 foot buffer, as though that somehow or other is reverent, and not as though the context of the ordinance was function and value. I mean, it remained so incredibly clear to me still that because he sat a standard that was not correct, he could not find evidence to get there, and he will still not because nothing indicates to me that he has changed his mind about the meaning of the ordinance.

HORNE: Well, I think the examiner has adopted the board's interpretation of the ordinance and I don't think that—at least I can't say, I mean obviously I can't look into his mind—but my

sense is that he will follow your interpretation of the code. In the last remand he asked for and was genuinely very interested in getting, excuse me, at all of the legal issues and so both parties were given the opportunity to provide argument on this and so he didn't just take this on his own and re-write it; he actually had both sides re-brief again these issues so that he made sure he was going through it. How this issue was missed I can't tell you, but I do think he probably…well, I do think he can approach this and do what the board directs.

STUART: My sense is that if he doesn't follow the board's legal interpretation of the code and that comes back to us, it becomes really easy for us because then it's clear…it's the first…then it becomes like the first time that the board heard it and when the board say, no, no, no, you didn't interpret the code correctly. And so at that point all we have to is say, okay, we've seen what you've done now. We still think you are misinterpreting the code as defined by the Board of County Commissioners. And if he decides you know…if he does what you're worried about, then I think that we have recourse on that, but if he doesn't do that work, we're going to see it anything eventually and it's just going to be a longer, more arduous process than it's already been for the applicant and everybody involved. That's…I don't know.

BOLDT: Okay.

MORRIS: Well, let's deal with all the other issues then so we have none left to remand it. It's very clear that it's a very simple remand. I just would note that at this point the board's action on that day was not…I mean it was unusual for three to agree so rapidly and so quickly—those three—but it was not unusual…I mean the discussion on the riparian habitat was not unusual and it was not unprecedented that the board read the code and the standard to be met differently than a hearings examiner because…well….wait until you get a Storedahl or an amphitheater or…back again.

BOLDT: So, Mr. Horne, we've covered two.

HORNE: Well, actually, the second issue raised essentially is the same issue because Mr. Hirokawa's second issue is the examiner recognized and relied upon the notion that the board acting in an appellate capacity issued findings and conclusions, so we'll resolve that. The third issue is the…the third claim is that the examiner failed to apply the wetland or riparian science and regulations to analyze whether this development proposal would adversely affect riparian areas, and instead relied upon the county habitat biologist's opinion that the intrusion is mitigated by preservation of an isolated wetland area. The examiner's findings and conclusions are not supported by substantial evidence. The examiner in that regard…I'm not sure there's…I was looking to see if the examiner made any reference to the board, but that would be the next issue. I'm not sure if you want to specifically analyze this because I think the examiner did not have significant problems factually with the wetland issues. It was more fundamentally with the habitat conservation ordinance, but I can review his portion of the analysis related to the wetland and to the extent that there's an issue, I'm glad to identify for the board.

BOLDT: Okay. Next?

HORNE: The fourth issue –

MORRIS: I want to go back just a minute to three and I want to make a comment on Mr. Hirokawa's discussion of best available science. You already touched on that. I'm going to depend on my own expertise in discussions of applicability of best available science, since I have a lot of experience in this discussion and as the applicant's attorney has pointed out, best available science is applied not at the application level, but at the ordinance level and this ordinance had already passed the test of best available science so the ordinance itself was not in question. Mr. Hirokawa suggests that somehow or other WDFW's 200 foot buffer is to be required in all places. The habitat ordinance specifically talks about the zone and the functions and values of the zone. The zone is 200 feet. There is a difference between the sanctity of what

Mr. Hirokawa appears to accrue to the WDFW "best available science," and the best available science that's actually employed in the ordinance which has passed the test. So WDFW's 200 foot buffer is not in violate. As a matter of fact, WDFW testified in support of the habitat conservation ordinance when it was adopted in 1997. So I want to make clear for the hearings examiner, Mr. Hirokawa, and the record, that this is not to be applied at the application level. Mr. Howe was indeed at the application level the best available science and the examiner ignored him. That's all.

HORNE: The fifth issue has already been resolved by the board and that is the examiner concluded that the board ruled that a riparian habitat can be replaced by a non-riparian habitat area to satisfy the functional requirements of the habitat ordinance. Even though he was inclined to disagree, the examiner's findings and conclusions are not supported by substantial evidence. The board has previously rendered an interpretation to the extent of habitat mitigation can be accomplished and so I can provide any further direction the board wants, but I think the board's first resolution in discussing the availability for internal riparian habitat averaging has already been addressed, but I defer to the board.

MORRIS: Where did we do that in the first resolution? Is that in the recitations?

HORNE: It should be in the actual decision that the habitat ordinance allows –

MORRIS: Not the first resolution, it isn't.

HORNE: I'm not seeing in the record that there's document…

MORRIS: Which one are you looking for?

HORNE: The first resolution.

MORRIS: The first resolution is under Tab 50 – I'm sorry, 51, in the book for the May 9 hearing – I'm sorry, not May 9th…August 31st.

HORNE: You're correct. The 4-16 resolution doesn't specifically say that. Been accepted by everyone, but to the extent there's any question then we can put that in the resolution of the correct interpretation of the use of non-riparian…non-regulated riparian area that can be used as a mitigation for internal riparian habitat averaging.

MORRIS: It's also very common.

BOLDT: Number 6.

HORNE: The sixth issue is a SEPA issue and whether or not the analysis if the examiner was segregated because of the application by the property owner for a road modification and the potential that further environmental review might be warranted, the appellant argued that because there may be additional environmental review required in the future, that that was improve piecemealing and a violation of SEPA. The examiner rejected that conclusion and obviously the applicant supported that rejection. The…I think the examiner initially found that the SEPA issues were mute and independently concluded even if they weren't mute, that he would deny those SEPA issues so I'm not sure if the board wants to provide additional direction on that question, but I think they were addressed in the record and I think his analysis has been consistent on that question.

BOLDT: Okay. Number 7.

HORNE: Seventh issue is the examiner concluded that the PUD factors had been met due to the size. The PUD ordinance has a requirement that land be of a certain size: six acres, or if not

six acres, that it contain area with certain criteria and the applicant has challenged whether or not those determinations are supported by substantial evidence.

BOLDT: Number 8.

MORRIS: Well, what do we don't want to do with seven?

BOLDT: Do we have to do anything? I read that and I thought there was enough.

HORNE: If the board concludes it needs any additional clarification, I'm glad to provide it. If the board concludes that given how it's been treated and analyzed previously by the examiner it doesn't require any additional work, then I'll note that.

MORRIS: Okay. Mr. Horne, are you working from the staff report?

HORNE: No, I'm working from Mr. Hirokawa's first appeal to the Board of County Commissioners, filed March 27, 2006, and it is your tabbed document B. It starts out with an appeal page and has a summary and then the next document is from Erickson and Hirokawa, dated March 27, and I'm currently on page –

MORRIS: Well, I was following you for awhile and then I lost you on this. Thanks.

BOLDT: Next is PUD is not a rezone. We dealt with that I thought.

HORNE: The next question is issue number 9, the examiner found that the wetland protection plan is feasible although it is not yet complete and must still be altered to provide further mitigation for lost riparian areas. The examiner's findings and conclusions are not supported by substantial evidence. Brent Davis had had some issue, at least early on, with the mitigation plan

proposed by the applicant and had requested additional conditions of approval be adopted, but with the adoption of those approval criteria agreed…or had recommended approval of the issuance of the wetland review or wetland permit as being in compliance with the wetland ordinance. But that's the context, I think, in which the issue originally arose and I think the challenge of the appellants is that conditioning compliance in the future is not adequate…is not adequate compliance and if you bear with me I'll give you a short example of how that came up in the Aiken appeal because that exact issue was litigated in the Court of Appeals in Aiken. The board has approved previously conditions of approval if compliance was reasonably likely or reasonably available. In Aiken, demonstrating that certain lots would perk was a serious question and based on the number of failures they had, was serious enough that it was made a condition of preliminary plat approval so they had to do it up front. So the Court of Appeals affirmed that kind of approach, saying if it's reasonable capable of being satisfied, you can make it a condition of approval like digging a well as compliance with showing you have water, but if there's a real question of whether there's water available proving it up front may be a legitimate condition. In this case, Mr. Davis recommended that conditions of approval were adequate that this was something that was reasonably achievable

BOLDT: That's fine with me. Number 10?

HORNE: Number 10, the examiner found that the habitat buffer averaging plan does or can comply with modifications and detail. This is once again all habitat conservation that we will discuss in terms of directing that he make findings regarding these specific issues, subject to the interpretations the board's already made.

BOLDT: Okay. 11.

HORNE: Number 11 is the examiner found that the stormwater plan does or can comply with stormwater regulations. The examiner findings are not supported by substantial evidence and are

based on erroneous applications of the law. This originally had to do with the location of the stormwater facility, the appellant saying that there's nothing that allows it; the applicant saying that there's nothing that prohibits it; and the examiner concluding that it was acceptable based on the fact that you can…that if there's not a prohibition then it's at least available barring some other law that might prohibit it.

BOLDT: Okay, and the last one, number 12.

HORNE: The –

MORRIS: I think it would be okay for us to clarify then that as a point of law at this point in time under the existing habitat ordinance that is acceptable under the ordinance.

HORNE: Okay.

MORRIS: Because I notice that in his discussion about this, the hearings examiner continues to say that he doesn't see how the board could possibly believe that the habitat, the riparian and the wetland could be double-counted. He talks about that again on page 8, but then he says accordingly, "the examiner is compelled to find that the stormwater facility is allowed in the riparian area." So I want us to clarify for him that, yes, under this board's interpretation of the code that is allowed.

HORNE: That a stormwater facility is allowed in the…

MORRIS: And that may be something that we're going to want to talk about, whether we want to clarify that more explicitly as we do the riparian code this time around.

STUART: It is clarified in the new…the draft of the wetland ordinance. I don't know in the habitat ordinance. We'll have to look. That's a good heads up.

BOLDT: Okay.

HORNE: Number 12, the examiner found that the county's wetland and habitat chapters were comprehensive as to foreclose analysis of unmitigated wetland and habitat impacts under SEPA. The examiner's findings and conclusions are not supported by substantial evidence and are based on an erroneous application of the law. This is one more SEPA issue. The examiner, as I said, originally found the SEPA challenge to be mute, but independently found that were he to address it, he would reject those challenges. I could just tell you that he has addressed this question on a couple of occasions.

BOLDT: Okay. So we have on a remand issue…

HORNE: The primary issue on remand will be to ensure that the applicant understands that the board's first resolution was only an interpretation of law and will be this corrected interpretation on stormwater facilities that the board has not made findings and that it is the examiner's obligation to one, make findings and conclusions based on those finding; that he will apply the law to the facts and render a decision.

MORRIS: And that the law assumes that the county biologist is an expert witness. I mean it does, that's why we hired one.

HORNE: Well, you may be, but I don't you can tell him that. You can't tell a judge…you can't even mention to a court—it's considered error—to even tell a jury…to ask a jury or to ask judge to declare your witness to be an expert. It's ultimately up to the examiner based on the individual facts of the case to determine whether or not somebody's credible.

MORRIS: That is true, but the code itself anticipates…the code anticipates that the biologist knows what he's talking about, otherwise we would have a planner do this. Mr. Uduk didn't do the riparian –

HORNE: I don't dispute that and I think he will do that, but I would suggest that it's probably not a good idea to make this any more muddy.

MORRIS: Okay.

HORNE: I will present this as quickly as I can, believe me.

MORRIS: Thank you, and I really am going to read it and I'm going to want to talk to you to make sure we're not leaving out, again, anything that…

HORNE: I will circulate it to both sides so that if that's the board's desire and I'd leave it up to the board, but I will certainly discuss it internally with our office and I will be glad to provide it to individual members of the board.

BOLDT: So the motion would be to?

STUART: The motion would be to overturn the hearings examiner on –

HORNE: To remand the matter back to the examiner for entry of findings based on his determinations of the facts contained in the record already existing in this case.

MORRIS: I want to narrow it.

HORNE: To the extent he concludes –

MORRIS: The motion is to uphold the hearings examiner on all matters, with the exception of the riparian zone, which is issue number—there may be two of these appealed issues relative…I can't remember the order…we want to clarify that we are sending it back for him to do findings of fact that support the habitat conservation ordinance as the previous board decided and as this board has clarified. Did I say that right? We're not remanding everything and I want us to avoid that because we made that mistake in the first remand and they got all back into everything and they were only suppose to get into the wetlands and that's what made it worse. We are only remanding on a single item of discussion, which is the habitat plan and whether or not it meets the sufficiency of the habitat conservation ordinance and the need for the hearings examiner to make findings of fact in that regard.

HORNE: Can I only suggest that you maybe broaden it slightly? And that is remand it on the habitat ordinance and the factual determinations that the examiner…for entry of findings and conclusions on those matters the examiner felt it was bound by the board, so that we narrow it to those issues that the examiner didn't decide because he felt he was bound to do so and make him make those decisions now. So it's only those limited areas and I think they're going to be in the habitat, but they may also spill over into the wetland ordinance and that's why I'm a little cautious about that. But only those ones that he concludes that he was bound by the board's prior factual determination.

MORRIS: Well, can you be even more specific? Can you go through appeal issues and delineate one by one by one, and say which one's the board upholds the hearings examiner on these appeal issues and the one's it remands?

HORNE: I can. I'm not sure I can do it at this moment because I have to look at his decision.

MORRIS: No, but in the resolution?

HORNE: Sure.

STUART: Okay, so I'll make the motion subject to approval of the resolution, you know, before we move forward with that. So moved as indicated by county council, contingent upon our approval of the resolution before moving forward.

MORRIS: And the motion is to uphold the hearings examiner, with the exception of delineated issues related to the riparian zone, and you'll delineate the issues? Or the appeal?

HORNE: Other findings that the examiner felt bound by.

MORRIS: Okay. Second.

BOLDT: Thank you. It's been moved and seconded to approve the hearings examiner, with the exceptions of the findings that will be in a resolution and remand that back to the hearings examiner. All in favor say aye.

STUART: Aye.

MORRIS: Aye.

BOLDT: Aye. All opposed? Motion carried. (See Tape 274)

Adjourned

COMMISSIONER COMMUNICATIONS

There were no comments.

BOARD OF COUNTY COMMISSIONERS

Marc Boldt, Chair

Steve Stuart, Commissioner

Betty Sue Morris, Commissioner

ATTEST:

Clerk of the Board

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